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No. _____

In The
Supreme Court of the United States

DANIEL GOLDSTEIN, ET AL.,
Petitioners,

v.

GEORGE E. PATAKI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the Court's statement that the Public Use Clause prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit," *Kelo v. City of New London*, 545 U.S. 469, 478 (2005), a rule of general application, or is it limited to takings justified *solely* on economic development grounds?

Does the substantial deference afforded to legislative public use determinations under *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), apply to non-legislative condemnation decisions?

What are the elements of a Public Use Clause claim, and how should such a claim be evaluated on a motion to dismiss, given the tension between *Kelo*'s assurance that "purpose" and "pretext" matter and *Midkiff*'s statement that courts should defer to a legislative taking that appears "rationally related to a conceivable public purpose"?

PARTIES TO THE PROCEEDINGS

Petitioners are Daniel Goldstein, Maria Gonzalez, Jerry Campbell, Yesenia Gonzalez, David Sheets, Jackie Gonzalez, Aaron Piller, Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Chadderton's Bar and Grill, Inc., Gelin Group, LLC, and Rockwell Property Management, LLC.

Respondents are George E. Pataki, New York State Urban Development Corporation, Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Company, Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC, Atlantic Yards Development Company, LLC, Michael Bloomberg, Daniel Doctoroff, Andrew M. Alper, Joshua Sirefman, City of New York and New York City Economic Development Corporation.

RULE 29.6 STATEMENT

Petitioners Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Chadderton's Bar and Grill, Inc., Gelin Group, LLC, and Rockwell Property Management, LLC have no parent companies, and no public company owns ten percent or more of their stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. A, 1a-30a) is reported at 516 F.3d 50. The decision of the district court (App. B, 31a-115a) is reported at 488 F. Supp. 2d 254. The report and recommendation of the magistrate judge (App. C, 116a-168a) is unofficially reported at 2007 WL 1695573.

JURISDICTION

The court of appeals entered its judgment affirming the dismissal of petitioners' complaint for failure to state a claim on February 1, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The public use requirement of the Takings Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

Fed. R. Civ. P. 12(b)(6) provides for pre-answer, pre-discovery dismissal for "failure to state a claim upon which relief may be granted."

STATEMENT OF THE CASE

A. Introduction

The court of appeals in this case made two novel rulings. Both collide with this Court's precedents interpreting the Public Use Clause, the decisions of other federal circuit courts of appeals, and various state court decisions, most notably the court of last resort for the District of Columbia. Both illustrate the confusion engendered by *Kelo v. City of New London*, 545 U.S. 469 (2005), in which the Court focused on the condemnors' "purpose," "motive," "intent" and "pretext," while at the same time hewing to the language of near absolute deference—*e.g.*, "palpably without reasonable foundation" and "rationally related to a conceivable public purpose"—set forth in *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984).

First, the court of appeals held that a decision to seize scores of private homes and businesses openly coveted—indeed long targeted for acquisition—by a single powerful real estate developer is wholly immune from judicial scrutiny provided that the official who acceded to the developer's demand proffers a minimally plausible (albeit indisputably *post hoc*) pretext, such as the elimination of blight. 1a-30a.

This holding is directly at odds with this Court's reassurance in *Kelo* that the Public Use Clause "no doubt" prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit." 545 U.S. at 477-78. Nothing in *Kelo* supports the court of appeals'

holding that private takings justified by "classic" public purposes—*i.e.*, any purpose other than economic development—must be dismissed on the pleadings.

Moreover, this holding is flatly contrary to a recent decision from the highest court for the District of Columbia, which, faced with the identical question concerning the scope of *Kelo*'s "pretext" reference, reinstated the property owner's pleading and remanded so discovery could be conducted into whether the government's blight justification was pretextual. *See Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).

Second, the court of appeals held that *all* eminent domain decisions, whether legislative or not, must be upheld unless they are "palpably without reasonable foundation" or are not "rationally related to a conceivable public purpose." 20a. This highly deferential standard is, of course, derived from *Midkiff*, 467 U.S. at 232-34 (reviewing enactment of the Hawaii legislature), and *Berman*, 348 U.S. at 29-31 (reviewing law passed by Congress and determination of the District of Columbia Commissioners). The court of appeals, however, saw no basis for easing the standard of review on a motion to dismiss in this case even though the public benefit decision was officially made by a group of unelected directors of a quasi-governmental corporation[1] and bears none of the indicia of a presumptively legitimate taking. 20a

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[1] Respondent New York State Urban Development Corporation (doing business as Empire State Development Corporation).

The decision by the court of appeals to afford the same deference to respondents' takings determination as it would a legislative body is inconsistent with this Court's Public Use Clause precedents, which speak almost exclusively about the judicial deference owed to *legislative* determinations. Nor can it be squared with the decisions of other circuits. *See Daniels v. Area Plan Comm'n of Allen County*, 306 F.3d 445 (7th Cir. 2002) (holding that the *Midkiff* and *Berman* standard does not apply to unrestrained administrative decisions); *Armendariz v. Penman*, 75 F.3d 1311, 1321 (9th Cir. 1996) (*en banc*) (refusing to apply "the usual extreme deference that courts owe to legislative determinations of public use" under *Berman* and *Midkiff*).

Finally, this Court's focus on the "purpose," "motive," and "intent" behind the takings in *Kelo* and its recognition that true purposes may be concealed by pretextual justifications is difficult to reconcile with the teaching of *Midkiff* and *Berman*, which require restraint unless a proffered justification is "palpably without reasonable foundation" or is not "rationally related to a conceivable public purpose."

In the years since *Kelo* was decided, no court has managed to resolve this tension. Instead, lacking guidance from this Court, they arbitrarily choose one approach or the other.

Some, like the court of appeals and the district court in this case, choose to ignore *Kelo*, believing that to do otherwise would amount to "overrul[ing] *Berman*, *Midkiff*, and over a century of precedent and . . . require federal courts in all cases to give close scrutiny

to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various officials who approved it." 25a.

Others, like *Franco*, choose to effectively ignore *Midkiff*, reinstate the pleading, and remand for discovery concerning the legislature's motive in making a finding of public purpose because "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes." 930 A.2d at 171.

In an area as important and fraught with difficulty as the circumstances under which the government is allowed to forcibly appropriate private property, this continuing confusion is both unacceptable and unnecessary. This Court can readily resolve the tension, harmonize its Public Use Clause jurisprudence, and articulate uniform standards for courts to employ when reviewing pretext-based Public Use Clause claims.

B. Petitioners' Allegations

Petitioners challenge the taking of their homes and businesses as unconstitutional. The pertinent allegations are summarized below. *See generally* Amended Complaint ("Complaint") (App. D, 169a-216a).

On or before 2002, respondent Bruce Ratner conceived a plan to develop a large, 22 acre swath of central Brooklyn, New York. 184a-185a.

Ratner's plan, which later became known as the Atlantic Yards Arena and Redevelopment Project ("Project"), included 16 high-rise office and apartment towers ranging from 18 to 60 stories and totaling about 8.8 million square feet of office, residential and commercial space, a 180-room hotel, and an arena for a professional basketball team. 171a, n.1, 183a.

Ratner's vision faced significant hurdles: (1) approximately half of the site—68 separate parcels and 123 tax lots—was privately owned in a prosperous community where property values were increasing rapidly (the "Takings Area"),[2] 186a-188a; (2) the other half of the site was primarily a below-grade open rail yard owned by the state Metropolitan Transportation Authority ("MTA"), *id.*, a public authority controlled by respondents George Pataki and Michael Bloomberg, 178a; (3) the massive scope of the Project violated scores of local zoning laws, including density, height, and use restrictions, 189a; and (4) the selection of private developers for projects that receive billions of dollars in tax breaks and direct subsidies are typically subject to competitive selection. *Id.*

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[2] The Takings Area consists primarily of two large, non-contiguous, rectangularly shaped parcels situated directly south of the rail yards. These two parcels, containing petitioners' homes and businesses, are separated by an equally large rectangular parcel owned in substantial part by a developer who, early on, cut a deal with Ratner to spare his property from condemnation. Petitioners were less fortunate. *See* Matthew Schuerman, *Ratner Rules: Brooklyn Nets Plan Spares Developer Shaya Boymelgreen's Project*, VILL. VOICE, Apr. 5, 2004, *available at* http://www.villagevoice.com/news/0414, schuerman,52432,5.html.

Ratner's plan to overcome these daunting hurdles was simple: secure the support and assistance of respondents Pataki and Bloomberg. Only Pataki and Bloomberg could: (1) wield the power of eminent domain to seize the 68 parcels of private property and transfer them to Ratner; (2) direct the MTA to sell the rail yard to Ratner without competitive bidding; (3) award the entire Project to Ratner, including billions in tax breaks and direct subsidies, without a competitive selection process of any kind; (4) bypass all local zoning laws; and (5) bypass local law mandating approval by the 51-member legislative body, the New York City Council. *Id.*

No later than 2003, Ratner, a top political supporter of Pataki (who was known to have presidential aspirations at the time), secured the unqualified support of his old law school friend.[3] From that point onward, the Project, and the billions in profit it would generate for Ratner and his companies, was a *fait accompli*. 185a.

The vehicle employed to clear the obstacles to the Project was respondent New York State Urban Development Corporation (doing business as the Empire State Development Corporation ("ESDC")). The ESDC was created in 1968. It is a quasi-governmental corporation that was wholly controlled by Pataki at all relevant times. It has the power to

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[3] *See "For Brooklyn, a Celebration or a Curse?"*, WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.").

condemn private property and to bypass local zoning laws and legislative review procedures. 189a.

1. The Rail Yards. The Project was so wired that the chief spokesperson for the MTA told reporters, on two separate occasions in 2004, that the rail yards, which accounted for about 40% of Ratner's site, had already been conveyed to Ratner in a private deal. 190a.

Later, in May 2005, the MTA retracted those statements, and announced a "competitive" selection process. The MTA's request for proposals ("RFP") to purchase and develop the rail yards was a sham. The time allotted for responses was a mere 42 days. This was a significant advantage for Ratner, who, unlike others, had devised his mammoth Project years earlier. 191a.

Even though the deadline was short, a well-respected developer, Extell, submitted a proposal to purchase the rail yards for $150 million. The Extell proposal was limited to the rail yards themselves. It did not require, nor contemplate, condemning nearby homes and businesses. It was a lower density project that did not require wholesale zoning overrides, was subject to City Council approval, and was expected to create jobs, affordable housing, and tax revenues. Extell's proposal fully complied with the RFP, including the requirement that all submissions include a twenty-year profit and loss projection. 191a-192a.

Ratner offered $50 million for the rail yards. The appraised value of the rail yards was $214.5 million. Ratner's offer was contingent upon condemning

petitioners' properties and bypassing local zoning and city council review laws. Ratner refused to provide the requisite profit projection. *Id.*

Ratner's non-compliant, non-responsive proposal for $50 million was accepted by the MTA. Extell's compliant proposal for $150 million was rejected.[4] *Id.*

2. Blight. The Project was officially announced in December 2003. The public benefit touted at that time was economic development, including the alleged creation of jobs and the specter of a professional basketball team moving from New Jersey to Brooklyn. Neither the alleged existence of blight nor its remediation was ever mentioned. 197a.

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[4] The MTA's July 2007 request for proposals to develop the Hudson rail yards in Manhattan ("Hudson RFP") stands in sharp contrast to the MTA's May 2005 RFP for Ratner ("Ratner RFP"). Unlike the Ratner RFP, the MTA and the City, including the City Council and local community boards, engaged in an extensive planning process culminating in a comprehensive development plan for the area before soliciting bids from developers. The Ratner RFP was only forty-two pages long. It provided little guidance to developers interested in the property. It did not present a comprehensive or detailed vision for the future of the site. Responses were due no later than forty-two days after its release. 190a-193a. The Hudson RFP was 1,369 pages long. It was comprehensive, detailed, and contained hundreds of pages of design guidelines, thus ensuring that the pre-determined needs of the public would be met. There was a ninety-two day window from RFP publication to the deadline for submitting responses. *See* Hudson RFP, *available at* http://www.mtawsy.com/en-US/.

Ratner signed a series of Memoranda of Understanding ("MOUs") with the ESDC concerning the Project in 2004 and 2005. The MOUs describe the Project and its anticipated benefits. They do not mention the existence or remediation of blight. 189a-190a.

Following the Project's announcement in December 2003, Ratner, using the threat of eminent domain, aggressively purchased property in the Takings Area, cleared out buildings, and left them empty. Petitioners, whose homes and businesses occupy more than 20% of the Takings Area, resisted. 187a-188a.

The first mention of blight by respondents occurred two years after the Project was first announced and after Ratner had acquired numerous properties in the Takings Area and let them lie fallow. In late 2005, the ESDC retained a consultant, AKRF, to conduct a "blight study." 197a-198a.

The sole objective of the study was to justify Ratner's property selection. *Id.* Rather than a review of Ratner's site *and its environs*, the study examined exclusively the properties Ratner had selected for acquisition years before. Not a speck of land bordering the irregularly shaped Project site was evaluated for blight. *Id.*

AKRF was paid by Ratner. Without exception, every study ever conducted by AKRF has been pro-development. AKRF did not disappoint. In a report issued almost three years after the Project was publicly unveiled, AKRF concluded that about 50% of the Takings Area was characterized by blight. For

many of the properties included in the "blighted" 50% of the Takings Area, the sole blighting condition was "underutilization," meaning the owners of those properties had elected not to build to more than 60% of the maximum square footage allowed by law. Others had "graffiti."[5] *Id.*

Petitioners' homes and businesses are not blighted. The Takings Area is not blighted. 187a, 197a, 207a.

3. Other Pretexts. Rather than acknowledging the true purpose served by the seizure of petitioners' homes and businesses, respondents have proffered a number of alleged public benefit justifications. All are false. 171a, 207a.

The arena for Ratner's professional basketball team is no more a public benefit than the planned hotel. Both, like countless other consumer oriented businesses, will be accessible to the public – for a price. When first announced, the City of New York agreed to contribute $100 million. Based on that figure, the Independent Budget Office of New York City (IBO) initially concluded that the professional basketball arena would generate – at best – less than $1 million per year in new tax revenue for the City over thirty years. 196a. Later, the City committed an additional

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[5] No doubt the entire City of New York, indeed most any urban city, would be declared blighted under these standards.

$105 million to Ratner.[6] Thus, under the best case, the arena will be a $70 million loss to the City.[7]

The Project will not create affordable housing. Ratner recently conceded that, while he was confident about starting construction on the arena for his basketball team, the residential construction "could be put off for years." *See "Slow Economy Likely to Stall Atlantic Yards,"* N.Y. TIMES, Mar. 21, 2008, at A1. Affordable housing funds are no longer available, and there is no established timeline for the affordable housing phase of the Project. *Id.* The promise of affordable housing will never be realized. It is a stalking horse for luxury condominiums and an arena for Ratner's basketball team.

ESDC's own study concluded that the Project could indirectly eliminate 2,929 at-risk households (defined as "privately held units that are unprotected by rent regulations, whose incomes or poverty status indicates that they could not pay substantial rent increases").

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[6] Eliot Brown, *Bloomberg Budget Doubles Subsidy for Atlantic Yards*, N.Y. SUN, Jan. 30, 2007, *available at* http://www.nysun.com/article/47664.

[7] It is well established that sports arenas do not benefit the economy. *See* MARK S. ROSENTRAUB, MAJOR LEAGUE LOSERS: THE REAL COST OF SPORTS AND WHO'S PAYING FOR IT (1999). Claims to social benefits have also been debunked. *See* KEVIN J. DELANEY AND RICK ECKSTEIN, PUBLIC DOLLARS, PRIVATE STADIUMS: THE BATTLE OVER BUILDING SPORTS STADIUMS (2003).

200a.[8] Thus, nearly 3000 low-income households will be displaced in exchange for the ever-dwindling possibility that it might create 2,250 affordable units—a net affordable housing loss. 200a.

4. Benefit To Ratner. Ratner will receive special discretionary perks, including without limitation a minimum of $305 million in capital contributions from the City and State, zoning overrides, a government blank check eliminating the risk of "extraordinary infrastructure costs," low-cost financing for the arena, housing, property, and mortgage tax exemptions, City land conveyed for one dollar, and the guaranteed transfer of petitioners' properties. 190a; *see also supra* note 6.

Ratner will profit enormously from the Project. The magnitude of that profit is not known, however, because Ratner has refused to disclose this data publicly.[9] Ratner's profit from the Project has been conservatively estimated at one billion dollars. 202a.

C. The Second Circuit's Decision

The court of appeals affirmed the dismissal of the Complaint for failure to state a claim. The court of

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[8] *See also* Final Environmental Impact Statement, ch.4, at3, *available at* http://www.empire.state.ny.us/pdf/AtlanticYards/FEIS/Volume1/04_Socio/04_Socio.pdf.

[9] Ratner refused to disclose his profit projections even to the ESDC. Eliot Brown, *State Never Saw Business Plan For Atlantic Yards Project*, N.Y. SUN, Mar. 28, 2007, *available at* http://www.nysun.com/article/51354.

appeals began its analysis by noting that "one person's property may not be taken for the benefit of another private person without a justifying public purpose." 13a (citing *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80 (1937)). The court observed that its role "in reviewing a *legislature's* judgment of what constitutes public use, . . . [is] 'extremely narrow.'" 14a (citing *Midkiff*, 467 U.S. at 240, and *Berman*, 348 U.S. at 32) (emphasis supplied). "Judicial deference is required because . . . *legislatures* are better able to assess what public purposes should be advanced by an exercise of the taking power." *Id.* (quoting *Midkiff*, 467 U.S. at 244) (emphasis supplied). Thus, the court explained, its "'review of a *legislature's* public use determination is limited" to whether "the exercise of the eminent domain power is rationally related to a conceivable public purpose.'" 15a (quoting *Midkiff*, 467 U.S. at 241) (emphasis supplied).

Recognizing that the primary thrust of petitioners' claim was that respondents' *post hoc* references to public purpose were a "mere pretext" designed to conceal their "actual purpose . . . to bestow a private benefit," 21a (quoting *Kelo*, 545 U.S. at 478), the court of appeals held that this Court's reference to the "long accepted" proposition that the Public Use Clause prohibits pretextual takings actually intended to confer a private benefit was limited *solely* to circumstances where the pretext offered is economic development. Thus, the court held that as long as a public benefit justification with a more established pedigree than economic development is offered—*e.g.*, the elimination of blight (*Berman*) or concentrated land ownership (*Midkiff*)—the takings decision is

insulated from judicial scrutiny and dismissal at the pleading stage is warranted. 21a-25a, 27a-28a.[10]

This is so, explained the court, because the reference to pretext in *Kelo* "must be understood in light of both the holding of the case," which permitted a taking "solely on the basis of an economic development rationale," and *Kelo*'s "self-identification with a tradition of public use jurisprudence that . . . 'has wisely eschewed . . . intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify use of the takings power.'" 21a-22a (quoting *Kelo*, 545 U.S. at 483).

Dramatically mischaracterizing petitioners' arguments, the court of appeals "reject[ed] the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman*, *Midkiff*, and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of various government officials who approved it." 25a.

The court of appeals did not address petitioners' argument that the only way to harmonize this Court's precedents was to allow pretext claims to proceed past

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[10] Quoting Justice O'Connor's dissent in *Kelo*, the court of appeals suggested that "a *railroad*, a public utility, or a *stadium*" are all accepted public uses. 22a n.8 (quoting *Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting)) (emphasis in original). Justice O'Connor's dissent offered citations for the proposition that a railroad and a public utility are accepted public uses, but not a stadium. *See Kelo*, 545 U.S. at 498 (O'Connor, J., dissenting).

the pleading stage in those rare circumstances where, as here, the traditional indicia of a legitimate taking decision are plainly absent—*e.g.*, *inter alia*, where (1) a legislative body plays no role in determining public purpose, (2) the properties slated for condemnation are selected by the private beneficiary in the first instance, rather than as part of a comprehensive government-initiated plan, (3) no alternative development sites are ever considered (*i.e.*, sites that would not require condemnation at all, or sites that would burden those who the developer spared when he drew an oddly shaped, non-contiguous takings map), (4) the sole beneficiary of the land transfer is known before the decision to condemn, (5) no competitive process for selecting the private beneficiary is employed, (6) only a single plan (the developer/beneficiary's plan) is ever considered, (7) the public benefit justification is identified *after* the decision to condemn, and (8) the normal process for approving massive zoning variances and assessing public benefit (here, review by the local legislature, the New York City Council) is bypassed entirely.

The two indicia of legitimacy the court of appeals did address were (1) the complete absence of legislative involvement in the takings decision and (2) what it characterized as the "sequence of events." 28a.

The court of appeals held that the fact that the decision to seize petitioners' homes and businesses was made officially by the ESDC—a quasi-governmental corporation comprised of unelected directors beholden only to the Governor—was not relevant to determining whether the extremely deferential *Midkiff* standard of review applied at the pleading stage. 20a ("[W]e must

reject the argument that the ESDC is undeserving of such deference.").

Even though the takings and/or public purpose determinations in *Berman*, *Midkiff*, and *Kelo* all involved *legislative* bodies, the court of appeals did not explain its belief that the executive-dominated nature of the condemnor was irrelevant. Nor did it explain why this Court's references to the deference owed to *legislative* judgments of public purpose—language borne of rational basis review of facial challenges to legislative enactments—automatically translates to non-legislative decisions.

The court of appeals distilled petitioners' argument that the takings decision here was so devoid of any of the traditional indicia of legitimacy, factors detailed at length in *Kelo*, to the single charge that the Project "was proposed in the first instance by Ratner himself." 28a. So distilled, it dismissed petitioners' "sequence" argument for three reasons.

First, the court of appeals explained that "New York long ago decided by statute not to restrict the ESDC's mandate to those 'projects in which it is the prime mover.'" *Id.* (citations omitted). The court of appeals did not explain why this mattered. Whatever New York may have decided, the court failed to confront the highly probative and undisputed fact that petitioners' homes and businesses were never identified by the government in the first instance as necessary to further a pre-determined public purpose—a purpose that incidentally would also benefit an unknown private developer—but instead

were selected by a developer who was known to be the primary, indeed only, beneficiary of the taking.

Second, the court noted that *Kelo* reaffirmed that the "mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid." *Id.*

Third, the court reasoned that "substantial factors not present in *Kelo*" supported dismissal of petitioners' complaint. Here, the court reiterated its conclusion that *Kelo*'s teaching that a challenge to a taking based on an allegation of pretext is limited solely to cases where the citizens challenging the government's seizure of their homes have the good fortune of a "stupid staffer" forgetting to offer anything other than economic development as a justification. *Kelo*, 545 U.S. at 502 (O'Connor, J., dissenting); 29a.

Finally, the court of appeals dismissed what it described as Justice Kennedy's "caveat" that a "court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." 29a n.10 (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). Consistent with its holding concerning the limited applicability of the reference to "pretext" in this Court's majority opinion, the court of appeals further speculated that "Justice Kennedy [too] may well have intended this caveat to apply exclusively to cases where the *sole* ground asserted for the taking

was economic development." *Id.* (emphasis in original).

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision to Preclude Public Use Clause Claims as a Matter of Law Whenever the Proffered Public Purpose Pretext Is "Well-Established" or "Classic" Conflicts with the Decisions of this Court and Other Courts, Including the Highest Court for the District of Columbia

A. This Case. The Second Circuit held that this Court's reference to the "long accepted" proposition that the Public Use Clause "no doubt" prohibits takings actually intended to confer a private benefit—even where a pretextual justification is offered—is limited *solely* to circumstances where the proffered pretext is economic development. 21a-25a.

Thus, the court reasoned, because some of respondents' asserted public purpose justifications were "classic"—*e.g.*, the removal of "blight"—dismissal as a matter of law on the pleadings was required. Under the Second Circuit's analysis, it did not matter that the Complaint alleges that the area slated for condemnation (the "Takings Area") was not blighted. 24a-25a. It did not matter that the Complaint alleges—indeed, it is undisputed—that blight was not offered as a justification for the Project until years after it was announced. It did not matter that the only evidence of blight is a self-serving, *post hoc* 2006 "blight study" bought and paid for by Ratner, which examined exclusively the irregular footprint drawn by

Ratner and concluded that about 50% of the Takings Area was blighted. Nor did it matter that the "blighting conditions" identified in 50% of the Takings Area were caused by Ratner himself and included such "devastating" public concerns as "graffiti," "weeds," and "underutilization"—meaning properties that were not built to the maximum square footage allowed under the zoning code. *Id.*

B. *Kelo*. The third section of the majority opinion in *Kelo* reviews the Court's Public Use Clause jurisprudence. 545 at 477-83. In it, the Court discusses the "long accepted" proposition that a "City is no doubt forbidden from taking [a person's] land for the purpose of conferring a private benefit on a particular private party." *Kelo*, 545 U.S. at 477-78 (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*. 3 Dall. 386, 388 (1798)). The sentence that immediately follows is: "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Id.*

The reference to pretext in the second sentence is just another way of expressing the central point of the first: the Public Use Clause prohibits a taking, even when just compensation is provided, if the purpose of the taking is to benefit a particular private party. There is nothing remarkable or new about that rule, as demonstrated by this Court's citation to *Midkiff* and other Supreme Court authority dating back to just after the enactment of the Bill of Rights. There certainly is no basis to conclude, as the Second Circuit did here, that the rule is somehow limited to the

economic development (or any other) context.[11] 21a-25a.

The Second Circuit's decision is especially perplexing because a special rule applicable only to economic development takings is precisely what this Court *rejected* in *Kelo*. *Kelo*'s core holding is that there is no analytical difference between an economic development justification and any other public purpose. *Id.* at 484 (rejecting proposed "new bright-line rule that economic development does not qualify

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[11] Intimating that this Court's reference to pretext was novel, the Second Circuit characterized it as a "passing reference to 'pretext' . . . in a single sentence." 21a. Well before *Kelo*, however, federal courts had invalidated takings because the government's claim of public purpose were pretextual. *See infra* at 36.

State courts likewise have long entertained pretext-based Public Use Clause claims. *See City of Springfield v. Dreison Ivestments, Inc.*, Nos. 19991318, 991230,and 000014, 2000 WL 782971, at *40-48 (Mass. Super. Feb. 5, 2000) (post-trial finding invalidating proposed taking to build professional sports stadium because the "dominant reason" for the taking was to benefit a private interest and the "primary beneficiary . . . was not the public"); *Borough of Essex Fells v. Kessler Inst. for Rehabilitation, Inc.*, 673 A.2d 856 (N.J. Super. 1995) (dismissing condemnation complaint because stated public use was a pretext to exclude non-profit rehabilitation institute from community); *Pheasant Ridge Assoc. v. Burlington Town*, 506 N.E.2d 1152 (Mass. 1987); *Carroll County v. City of Bremen*, 347 S.E.2d 598 (Ga. 1986); *Earth Management, Inc. v. Heard County*, 283 S.E.2d 455 (Ga 1981); *Redevelopment Auth. v. Owners or Parties in Int.*, 274 A.2d 244 (Pa. 1977); *In re Real Prop. in Village of Hewlett Bay Park*, 265 N.Y.S.2d 1006 (N.Y. Sup. Ct. 1966); *City of Miami v. Wolfe*, 150 So.2d 489 (Fla. 1963).

as public use"); *id.* at 487 (rejecting argument that "for takings of this kind we should require a 'reasonable certainty' that the expected benefits will actually accrue").

In *Kelo,* this Court held that the takings were not intended to confer a private benefit because they were: (1) "executed pursuant to a 'carefully considered' development plan," (2) the "trial judge and all the members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose," and (3) the record evidence "clearly demonstrate[d] that the development plan was not intended to serve the interests of Pfizer, Inc., or any other private entity" because "the identities of those private parties were not known when the plan was adopted." *Kelo*, 545 U.S. at 478 & n.6 (quotations and citations omitted). The Court noted that it was, "of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.*

Unlike here, where no discovery was permitted and the court of appeals rejected inferences favorable to petitioners, the trial court in *Kelo* "conducted a careful and extensive inquiry into whether, in fact, the development plan [was] of primary benefit to . . . the developer, and private businesses which may eventually locate in the plan area, and in that regard, only of incidental benefit to the city." *Id.* at 491-92 (Kennedy, J., concurring) (citations omitted).

The trial court "considered testimony from government officials and corporate officers" and "documentary evidence of communications between

these parties" indicating that the government (1) committed substantial funds to the project before the private beneficiaries were known, (2) "reviewed a variety of development plans" before the private beneficiaries were known, and (3) "chose a private developer from a group of applicants rather than picking out a particular transferee beforehand." *Id.* Based on these findings, the trial court in *Kelo* concluded that benefitting a private party "was not the primary motivation or effect of this development plan." *Id.*

In this case, faced with detailed factual allegations presenting a powerful circumstantial picture that is the antithesis of the facts in *Kelo*, the Second Circuit upheld the pre-discovery dismissal of petitioner's Complaint because, in its view, petitioners "effectively acknowledged the Project's rational relationship to numerous well-established public uses." 24a.

While the Complaint no doubt acknowledges that respondents have sought to justify the use of eminent domain by *claiming* that various public benefits will accrue from the taking of petitioners' properties—including "traditional" public benefits such as the removal of blight—acknowledging respondents' *contentions* is a far cry from "effectively acknowledging" their *truth.*[12] Indeed, the Complaint

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[12] The court's willingness to read the Complaint as "effectively acknowledging" supposed public benefits when it expressly states otherwise (*e.g.*, "public does not benefit from the taking of [petitioners'] properties," 204a; takings "serve only one purpose:

expressly states that the *sole* purpose of the takings is to benefit Ratner, 172a, and that the public will not actually benefit from the seizures at all. 204a.

C. *Franco*. Faced with a case indistinguishable from petitioners' here, the Court of Appeals for the District of Columbia reinstated the property owner's pleading and remanded so discovery could be conducted concerning the true purpose of the taking. *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).

In *Franco*, a legislative body—the Council of the District of Columbia—passed a bill that included last-minute findings, including, among other "classic" public purposes, that the properties targeted for condemnation were "a blighting factor" in the immediate and surrounding communities. *Franco*, 930 A.2d at 163.

The findings that were added to the bill at the eleventh hour also determined that targeted properties were "underused, neglected, and poorly maintained," and that condemnation would "further many important public purposes, including removal of garbage and other unsanitary conditions, reduction of crime, reorganization of the site, provision of needed job opportunities and retail options for residents of the surrounding neighborhoods, revitalization of an economically distressed community, and expansion of

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[to benefit Ratner]," 172a) is especially troubling on a motion to dismiss.

the tax base of the District of Columbia." *Franco*, 930 A.2d at 163 (internal quotation marks omitted).

In his pleading challenging the condemnation of his property, Mr. Franco alleged that "the declared reason for the taking was pretextual and that the true purpose was to confer a private benefit on a particular private party" in violation of the "Fifth Amendment to the United States Constitution." *Id.* at 164. Specifically, Mr. Franco alleged that: (1) there was no "carefully considered development plan designed to serve a public purpose," (2) the determination to condemn and transfer his property to a pre-selected private developer was made two years before the legislation was passed, (3) all entreaties by the existing property owners to negotiate a deal to redevelop the site had been rejected, (4) the site was being sold to the pre-selected developer for $25 million less than its actual value, (5) the site was not "blighted or located in a blighted area," and (6) "the legislative findings inserted at the last minute were and remain pretextual, wrong, inaccurate, baseless and substantially irrelevant." *Id.* at 164, 170-71 (internal quotation marks omitted).

The trial court dismissed Mr. Franco's pleading, explaining, as the Second Circuit did here, that "once the legislature has declared a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext." *Id.* at 168. Relying on *Kelo*, the highest court for the District of Columbia reversed. In its view, *Kelo* recognized that the "government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be

allowed to allege and to demonstrate that the stated public purpose for the condemnation is pretextual." *Franco*, 930 A.2d at 169. Thus, because "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes," Mr. Franco's pleading was reinstated.

D. Other Courts. *Franco* is not the only court to interpret the reference to "pretext" in *Kelo* in this manner.

The federal district court in *MHC Fin. Ltd. P'ship v. San Rafael*, No. C 00-3785, 2006 WL 3507937, at *13-14 (N.D. Cal. Dec. 5, 2006), denied summary judgment and ordered a trial to determine whether the actual purpose of a city ordinance was to provide affordable housing as the city claimed, or whether affordable housing was merely a pretext to justify a private taking.[13] *Id.*

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[13] The court in *MHC Financing* explained its denial of summary judgment as follows:

> Despite the deference to a legislature's determination compelled by *Kelo* and *Midkiff*, the Supreme Court maintains that "[a] City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party . . . . Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit . . . ." The trial court in *Kelo* satisfied Justice Kennedy's standard through "careful and extensive inquiry into whether, in fact, the development plan is of primary benefit to the developer . . . [and] only incidental benefit to the

In *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), a state appellate court interpreted *Kelo* the same way. Adverting to *Kelo*, the court in *49 WB* explained that "[e]minent domain cannot be used as a mere pretext for conferring benefits upon purely private entities and persons." 839 N.Y.S.2d at 137. The court reviewed the government's claim that the impending condemnation was for a public purpose and invalidated the taking because "its ostensible purpose of providing affordable housing was a pretext to benefit private entities resulting in the creation of less affordable housing than if there had been no taking of property at all." *Id.* at 130.

II. The Court of Appeals' Decision Affording Substantial Deference to a Non-Legislative Takings Decision Conflicts with the Precedents of this Court and Other Circuit Courts of Appeal

Affording substantial deference to *legislative* judgments concerning the use of eminent domain to advance legitimate public purposes makes sense. Paying the same deference to a quasi-governmental corporation controlled by a governor and comprised of unelected "proxy" directors does not.

City." Such an inquiry will likewise be necessary in the present action.

Id. at *13-14 (citations omitted).

This Court's Public Use decisions have reviewed—and paid substantial deference to—*legislative* judgments concerning the propriety of condemnation for public use. *Berman* reviewed takings that were authorized in the first instance by Congress, followed by the consideration of multiple plans and final approval by a local legislative body (the District Commissioners). 348 U.S. at 28-29. *Midkiff* reviewed a law passed by a state legislature authorizing condemnation to advance the public purpose of eliminating a land oligopoly.[14] 467 U.S. at 233; *see also* 1967 Haw. Sess. Laws, Act 307, § 1. *Kelo* reviewed a city council's approval of the development plan, including the use of eminent domain. 545 U.S. at 475. Consistent with these authorities, the discussion of deference by the Second Circuit in this case uniformly references *legislative* judgments. 14a-15a.

This Court has never considered whether the deferential review required by *Berman*, *Midkiff*, and their predecessors should apply equally to non-legislative condemnation decisions, but the treatment of rational basis review under the Equal Protection Clause offers a guide to resolving the issue.

In conducting rational basis review of a legislative enactment, the legislature's intent "is not subject to courtroom fact-finding and may be based on rational

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[14] Indeed, the cases relied upon by the Court in *Midkiff* all involved legislative decisions. *See United States ex. rel. TVA v. Welch*, 327 U.S. 546 (1946); *Old Dominion, Inc. v. United States*, 269 U.S. 55 (1925); *United States v. Gettysburg Elec. R. Co.*, 160 U.S. 668, 680 (1896).

speculation unsupported by evidence of empirical data." *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993). Conversely, when conducting rational basis review of a non-legislative determination in a "class of one" case—where the question is whether a citizen has been intentionally singled out for irrational and unequal treatment—the deference due to legislative judgments is replaced by a factual inquiry into the decision-maker's true purpose. *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000); *see also Olech v. Village of Willowbrook*, No. 97 C 4935, 2002 WL 31317415 (N.D. Ill. Oct. 10, 2002) (denying post-remand, post-discovery motion for summary judgment because of fact issue concerning whether plaintiffs were intentionally treated differently without rational basis).

The Seventh and Ninth Circuits have both recognized that the deference required by *Berman* and *Midkiff* is not absolute. In *Daniels v. Area Plan Commission of Allen County*, 306 F.3d 445 (7th Cir. 2002), the Seventh Circuit reviewed the public use decision of an unelected administrative agency. The condemning agency argued that *Berman* and *Midkiff* required the court to defer its judgment. The Seventh Circuit disagreed, holding that such deference applies only where *the legislature itself* is involved in determining the meaning of "public use" for purposes of eminent domain. *Id.* at 460-61.

In *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), the Ninth Circuit, sitting *en banc*, refused to apply "the usual extreme deference that courts owe to legislative determinations of public use" under *Berman* and *Midkiff* because "[i]f officials could take private

property, even with adequate compensation, simply by deciding behind closed doors that some other use of the property would be a 'public use,' and if those officials could later justify their decisions in court merely by positing 'a conceivable public purpose' to which the taking is rationally related, the 'public use' provision of the Takings Clause would lose all power to restrain government takings." *Id.* at 1321.

Notwithstanding this Court's precedents—and, indeed, its own precedent[15]—the Second Circuit found that petitioners' claim that the decision to condemn was made by the executive (respondent Pataki) and then rubber stamped by the ESDC[16] was irrelevant and "reject[ed the argument that the ESDC is undeserving of such deference." 20a.

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[15] *See Nat'l R.R. Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261, 1264 (2d Cir. 1987) (reversing application of overly deferential standard of review to Amtrak condemnation because "Amtrak is not a 'governmental body'" and is instead "a creature of statute").

[16] New York law provides that the ESDC is an unelected, quasi-governmental corporation, wholly controlled by the Governor. N.Y. Unconsol. L. § 6254(1). The ESDC and its directors do not enjoy the privileges and immunities of a legislative body. Indeed, the ESDC is so removed from the traditional structure and function of government (whether legislative or executive) that the Eleventh Amendment does not protect it from suit. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (Eleventh Amendment does not apply to political subdivision); *see also Mancuso v. New York State Thruway Auth.*, 86 F.3d 289 (2d Cir. 1996).

III. The Analytical Divide Between *Kelo* on the One Hand and *Midkiff* and *Berman* on the Other Can Be Bridged

Two principles flow inescapably from *Berman*, *Midkiff*, and *Kelo*. First, courts considering a Public Use Clause claim must treat *legislative* judgments concerning whether a taking is necessary to accomplish a public purpose with substantial deference. This principle is so engrained that its application by the Supreme Court has resulted in the dismissal of the Public Use Clause cases it has decided since 1954 (albeit, where necessary, *after* the parties challenging the seizure of their land had been afforded an opportunity to develop and present evidence). *See, e.g.*, *Kelo*, 545 U.S. 475 (discovery followed by seven-day bench trial); *Berman*, 348 U.S. 26 (cross-motions for summary judgment based on uncontested facts).

Second, the Public Use Clause unquestionably prohibits the government from seizing a private citizen's property when the purpose of the taking is to benefit another, more favored private citizen. *Kelo*, 545 U.S. at 477 (government is "no doubt forbidden from taking [a private party's] land for the purpose of conferring a private benefit on a particular private party") (citing *Midkiff*, 467 U.S. at 245; *Missouri Pacific R. Co. v. Nebraska*, 164 U.S. 403 (1896); and *Calder v. Bull*, 3 Dall. 386, 388 (1798)).

These two principles create a clear analytical divide in Public Use Clause cases. On one side are cases in which the facts present sufficient indicia of legitimate public purpose such that no further intrusion into the legislative prerogative can be countenanced. On the

other side are cases that have none, or almost none, of these important indicia of legitimacy, thereby vitiating any judicial deference that otherwise would presumptively apply.

In the years since *Kelo* was decided, none of the courts faced with a Public Use Clause claim alleging a pretext has managed to bridge this divide. Instead, courts have uniformly chosen to either: (1) ignore *Kelo*'s references to "purpose," "motive," "intent," and "pretext" (as did the courts that evaluated the sufficiency of petitioners' complaint in this case) in favor of the "rationally related to a conceivable public purpose" language in *Midkiff*; or (2) essentially ignore *Midkiff* and focus instead on *Kelo's* language, thereby justifying discovery into legislative motives, *see Franco*, 930 A.2d at 173-75, or the denial of summary judgment and a trial, *see MHC Financing*, 2006 WL 3507937, at *13-14.

While no courts have expressly addressed the *quantum* of indicia of legitimacy necessary to warrant substantial deference to a takings decision, this Court's cases identify what those indicia are.

Substantial deference was afforded, and the takings were upheld, in *Kelo, Midkiff*, and *Berman*. A careful examination of these cases reveals that such deference is afforded when specific indicia of legitimacy are present.

When a taking is challenged on public use grounds, substantial deference should be given to the decision to condemn private property where all factors indicate

that the decision was driven by a desire to benefit the public. These factors include:

- **Legislative Decision.** *See supra* Point II.

- **Public Purpose Goal Identified at the Outset.** The specific public need or purpose is identified before the possibility of seizing private property is considered. *Kelo*, 545 U.S. at 473 (state designated entire City a distressed municipality two years before the City approved a redevelopment plan and four years before authorizing the use of eminent domain); *Midkiff*, 467 U.S. at 233 (before deciding to "redress these problems," the "legislature concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices, and injuring the public tranquility and welfare"); *Berman*, 348 U.S. at 28-29 (first Congress approved the use of eminent domain in general and then the local commissioners approved the specific map of targeted properties).[17]

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[17] In *Berman*, the takings were authorized in the first instance by Congress, followed by the consideration of multiple plans before final approval by the local legislative body (the District Commissioners), followed by the solicitation of "proposals to negotiate for the purchase or lease of land in the project area [and a]fter due consideration the Agency accepted the proposals of five bidders." *Schneider v. District of Columbia*, 117 F. Supp. 705, 708 (D.D.C. 1953) (three-judge court), *aff'd sub. nom.*, *Berman v. Parker*, 348 U.S. 26 (1954).

- **Carefully Considered Comprehensive Plan.** A legislative body develops or approves a comprehensive plan to advance the predetermined public purpose. *Kelo*, 545 U.S. at 475; *Midkiff*, 467 U.S. at 233; *Berman*, 348 U.S. at 28-29.

- **Consideration of Multiple Plans.** Multiple plans or options are considered prior to settling upon the plan that maximizes public benefit. *Kelo*, 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Comprehensive Plan Includes Takings Map.** The comprehensive development plan created or approved by the legislative body selects the property or series of properties that must be taken to advance the public purpose—*i.e.*, it draws the takings map. *Kelo*, 545 U.S. at 474 n.2 ("evaluated six alternative development proposals . . . which varied in extensiveness and emphasis"); *Berman*, 348 U.S. at 28-29.

- **Private Beneficiaries Unknown.** The private beneficiaries of the taking, particularly the private parties to whom the seized property will be transferred, are unknown when the comprehensive plan is developed and the properties needed to fulfill the plan are selected. *Kelo*, 545 U.S. at 491-492 (city council "reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand"); *id.* at 478 & n.6; *Berman* (as

detailed in *Schneider*, 117 F. Supp. at 708 ("accepted proposals of five bidders")).

- **Competitive Selection Process.** Insofar as the public benefit project contemplates seizure of property that will then be transferred to a private party for redevelopment, those parties are selected through an open, competitive process. *Kelo,* 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Funds Committed Before Beneficiary Known.** The legislative body commits public funds to the project before the private beneficiaries are known. *Kelo,* 545 U.S. at 491-92; *Berman* (as detailed in *Schneider*, 117 F. Supp. at 708).

- **Procedural Requirements That Facilitate Inquiry Into Purposes.** The decision to exercise eminent domain is subject to "elaborate procedural requirements . . . to facilitate . . . inquiry into the city's purposes." *Kelo*, 545 U.S. at 493.

Two things are clear. When all of the legitimacy factors identified by the Court in *Kelo* and outlined above are present, substantial deference should be paid to takings decisions, including the identification of the precise properties needed to accomplish a public purpose. *Berman*, 348 U.S. at 35-36 (stating that it "is not for the courts to oversee the boundary line" and that "the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of

the legislative branch"). The court's role is limited and deferential. As long as the proposed taking will advance a "conceivable public purpose," it will be upheld.

Conversely, when none of the legitimacy factors are present, such circumstances give rise to a reasonable "suspicion that a private purpose [may be] afoot." *Kelo*, 545 U.S. at 487-88 & n.17 (noting that a "a one-to-one transfer of property outside the confines of an integrated development plan" would be "an unusual exercise of government power [that] would certainly raise a suspicion that a private purpose was afoot," and that such "aberrations" should be viewed "with a skeptical eye" and "can be confronted if and when they arise" (citing *99 Cents Only Store v. Lancaster Redevelopment Agcy.*, 237 F. Supp. 2d 1123 (C.D. Ca. 2001)). The presumption of deference must give way so that courts can exercise their constitutional "role . . . in reviewing a . . . judgment of what constitutes a public use." *Midkiff*, 467 U.S. at 240.

Even before *Kelo*, federal district courts recognized that public use challenges to takings that bore no indicia of legitimacy were exceptions to the normal deference required by *Berman* and *Midkiff*. *See Aaron v. Target Corp.*, 269 F. Supp. 2d 1162 (E.D. Mo. 2003), *rev'd on other grounds*, 356 F.3d 768 (8th Cir. 2003); *Cottonwood Christian Center v. Cypress Redev. Agency*, 218 F. Supp. 2d 1203, 1215-16 (C.D. Cal. 2002); *99 Cents Only Stores v. Lancaster Dev. Agency*, 237 F. Supp. 2d 1123 (C.D. Cal. 2001), *appeal dismissed*, 60 Fed. Appx. 123 (9th Cir. 2003).

In *Aaron*, Target had leased its store from the plaintiffs for almost thirty years when it decided it wanted to build a new store on the sight. *Id.* at 1166-67. It approached the plaintiffs with a proposal to demolish and replace the store. The plaintiffs agreed to the concept, but proposed that the prospective rent be based on a percentage of Target's future profits at the site. Target never responded to the plaintiffs' proposal and instead approached the town alderman whose ward included the property "and threatened to abandon the . . . store unless [the Alderman] induced the City to give Target full fee-simple ownership of the Properties through the use of the City's condemnation power." *Id.* at 1167.

Thereafter, Target and the City jointly prepared a redevelopment proposal appointing Target as the redeveloper; Target commissioned and then "beefed up" a self-serving blight study; the City then waited over two months before soliciting public counter-proposals; and the City designated Target as its chosen redeveloper only days after soliciting alternatives from the public. *Id.* at 1167-69. The district court was able to make factual findings based on evidence submitted by the plaintiffs that had been gathered during discovery in the state court condemnation proceeding where the plaintiffs "were given up to two weeks to conduct discovery, the opportunity to take seven depositions, and the right to obtain all of [LCRA]'s relevant and non-privileged documents." *Aaron v. Target*, 357 F.3d at 777. Based on those findings, the court enjoined the taking. *Id.*

The important legitimacy factors identified in *Kelo* were nowhere to be found in *Aaron* (or *99 Cents*). They

are absent here as well. The question of where on the continuum between significant indicia of legitimacy (*Kelo, Midkiff,* and *Berman*) and virtually none (*Aaron, 99 Cents, Armendariz,* and *Cottonwood Christian Center*) a case must fall to warrant substantial deference is not an easy one. Until it is answered and uniform standards are articulated, some courts will continue to arbitrarily apply *Berman* and *Midkiff*, as the Second Circuit did here, and others will countenance factual inquiries into the legislative motives behind a taking, as did the court of last resort for the District of Columbia in *Franco.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 2008

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

07-2537-cv

[Filed February 1, 2008]

Daniel Goldstein, Jerry Campbell, as putative administrator of the estate of Oliver St. Clair Stewart and in his individual capacity, Gelin Group, LLC, Chadderton's Bar and Grill, Inc., d/b/a Freddy's Bar and Backroom, Maria Gonzales, Jackie Gonzales, Yesenia Gonzales, Huda Mufleh-Odeh, Jan Akhtar, David Sheets, Peter Williams Enterprises, Inc., 535 Carlton Ave. Realty Corp., Pacific Carlton Development Corp., Aaron Piller, and Rockwell Property Management, LLC,
Plaintiffs-Appellants,

v.

Governor George E. Pataki, New York State Urban Development Corporation, d/b/a Empire State Development Corporation, d/b/a Empire State Development Corporation, Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner

Company, Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC, Atlantic Yards Development Company, LLC, Michael Bloomberg, Daniel Doctoroff, Andrew M. Alper, Joshua Sirefman, City of New York, New York City Economic Development Corporation, Empire State Development Corporation, and Charles A. Gargano,
Defendants-Appellees.

Before: JACOBS, *Chief Judge*, KATZMANN and LIVINGSTON, *Circuit Judges*.*

KATZMANN, Circuit Judge:

Few powers of government have as immediate and intrusive an impact on the lives of citizens as the power of eminent domain. For affected property owners, monetary compensation may understandably seem an imperfect substitute for the hardships of dislocation and the loss of a home or business. But federal judges may not intervene in such matters simply on the basis of our sympathies. Just as eminent

* The Honorable Edward R. Korman of the Eastern District of New York, originally a member of this panel sitting by designation, recused himself following oral argument and had no role in the preparation of this decision. Accordingly, Chief Judge Dennis Jacobs was appointed as the third member of the panel pursuant to interim Local Rule § 0.14(b). At the time he was added to the panel, Judge Jacobs was furnished with a transcript and audio recording of oral argument as well as the briefs and the record on appeal.

domain has its costs, it has its benefits, and in all but the most extreme cases, Supreme Court precedent requires us to leave questions of how to balance the two to the elected representatives of government, notwithstanding the hardships felt by those whose property is slated for condemnation.

Against this backdrop, we must decide if a complaint has sufficiently alleged that an eminent domain action violates the Public Use Clause of the Fifth Amendment. In our view, the plaintiffs-appellants effectively acknowledge, albeit reluctantly, that the well-publicized, multibillion dollar development project they challenge would result, *inter alia,* in a new stadium for the New Jersey Nets, a public open space, the creation of affordable housing units and the redevelopment of an area in downtown Brooklyn afflicted for decades with substantial blight. They contend, however, that the project's public benefits are serving as a "pretext" that masks its actual raison d'être: enriching the private individual who proposed it and stands to profit most from its completion. Following Supreme Court precedent, we conclude that the plaintiffs have not mounted a viable Fifth Amendment challenge. The judgment of the district court is affirmed.

I.

Because this appeal follows the grant of a motion to dismiss, we must derive our version of the facts of record, including our description of the Atlantic Yards Project, from the allegations set forth in the plaintiffs' Amended Complaint, "taking [them] as true . . . and drawing all reasonable inferences in favor of the

plaintiff[s]." *Stuto v. Fleishman*, 164 F.3d 820, 824 (2d Cir. 1999).[1]

The Atlantic Yards Arena and Redevelopment Project (the "Atlantic Yards Project" or the "Project") is a publicly subsidized development project set to cover twenty-two acres in and around the Metropolitan Transit Authority's Vanderbilt Yards, an area in the heart of downtown Brooklyn, New York. The plan for the Project, which will be designed in part by the architect Frank Gehry, includes the construction of a sports arena that will play home to the National Basketball Association franchise currently known as the New Jersey Nets, no fewer than sixteen high-rise apartment towers, and several office towers. The Project site is bounded generally by Dean Street, Atlantic Avenue, Fourth Avenue, and Vanderbilt Avenue.

Announced to the public in December 2003, the Project is being carried out, in part, through the assistance of the New York State Urban Development Corporation, which also operates as the Empire State Development Corporation ("ESDC"), a public-benefit corporation and political subdivision of New York State. The involvement of the ESDC is critical. Although approximately half the proposed footprint for

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[1] Additionally, in assessing this motion, we may consider the "'documents plaintiffs had either in [their] possession or had knowledge of and upon which they relied in bringing suit.'" *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002) (quoting *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991)).

the Project lies within the Atlantic Terminal Urban Renewal Area ("Renewal Area"), a heavily blighted area owned in part by the Metropolitan Transit Authority ("MTA"), the Project site also includes an adjacent parcel of land with less blight (referred to in the complaint as the "Takings Area") that is currently held by private parties. Under the plan for the Project, the ESDC, if necessary, will acquire the rest of the privately held land in the Takings Area through the use of eminent domain.

Consistent with the strictures of New York's Eminent Domain Procedure Law, the ESDC held a public hearing, which it publicized in advance, on August 23, 2006, at which it discussed the proposal for the Project in detail. *See* N.Y. Em. Dom. Proc. Law § 202. Thereafter, in September 2006, members of the public were invited to attend a community forum on the Project where they could voice their concerns.

II.

Plaintiffs-appellants are fifteen property owners whose homes and businesses in the Takings Area are slated for condemnation to make way for the Project. In October 2006, they filed this action in the Eastern District of New York, naming as defendants Appellee Bruce Ratner, the private developer carrying out the Project, several entities affiliated with him (collectively, the "Forest City Ratner Appellees" or "Ratner Group") and various officials, agencies, and subdivisions of New York State and New York City (respectively, the "State Appellees" and "City

Appellees").[2] The action was assigned to the Hon. Nicholas G. Garaufis.

Apparently, after being consolidated, this action represented the first challenge in federal court to the Atlantic Yards Project. The original complaint raised three federal-law claims, asserting that the use of eminent domain in furtherance of the Project would violate the "Public Use" Clause of the Fifth Amendment, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. Thereafter, the plaintiffs amended the complaint, asserting the same three federal-law causes of action against all defendants, and adding a cause of action under New York state law against defendant ESDC.

Each of the claims relies on slightly different allegations.[3] The heart of the complaint, however, and

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[2] Defendants initially took the position that these claims were not ripe for adjudication, On appeal, however, they concede the ripeness issue because the condemnation process is much further along than it was at the filing of this action. As we have been given every indication that the takings at issue are imminent, we do not address ripeness.

[3] In support of the first cause of action, under 42 U.S.C. § 1983, the plaintiffs alleged that the defendants violated their Fifth Amendment rights by using the power of eminent domain where the "claims of public benefit are a pretext." The plaintiffs specifically allege in support of this claim that the "public does not benefit from the taking of plaintiff's properties" and "[a]lternatively . . . any benefit from the taking of plaintiffs' properties . . . is secondary and incidental to the benefit that inures to [the Ratner Group]" because the "desire to confer a

the centerpiece of the instant appeal, is its far-reaching allegation that the Project, from its very inception, has not been driven by legitimate concern for the public benefit on the part of the relevant government officials. Appellants contend that a "substantial" motivation of the various state and local government officials who approved or acquiesced in the approval of the Project has been to benefit Bruce Ratner, the man whose company first proposed it and who serves as the Project's primary developer. Ratner is also the principal owner of the New Jersey Nets. In short, the plaintiffs argue that all of the "public uses" the defendants have advanced for the Project are pretexts for a private taking that violates the Fifth Amendment.

The defendants timely moved to dismiss all the claims on various grounds, among them that the complaint failed to state a claim upon which relief could be granted. *See* Fed. R. Civ. P. 12(b)(6).

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private benefit to [the Ratner Group] was a substantial, motivating factor, in defendants' decision to seize plaintiffs' property and transfer it to [the Ratner Group]." The second cause of action rests on the claim that the defendants have violated the Equal Protection Clause by "[e]levating the status of one citizen or group of citizens" (namely, the Ratner defendants) and by "singling out plaintiffs, for unequal, adverse [] treatment" without a rational basis. The third cause of action alleges primarily that, in circumventing the local review process (and instead working at the state level with the ESDC), plaintiffs violated defendants' procedural due process rights. The fourth cause of action–whose dismissal without prejudice is not challenged unless we reinstate one or more of the federal claims–alleges various violations of N.Y. Em. Dom. Proc. Law § 207 as against defendant ESDC.

Magistrate Judge Robert Levy, to whom the Rule 12 motion practice was referred, issued a Report and Recommendation ("R & R") recommending that the district court abstain from deciding the issue under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). *See Goldstein v. Pataki*, 2007 WL 1695573 (E.D.N.Y. Feb. 23, 2007). After objections were filed, Judge Garaufis rejected this aspect of the R & R, and, instead, dismissed the federal claims in the amended complaint with prejudice. *See Goldstein v. Pataki*, 488 F. Supp. 2d 254 (E.D.N.Y. 2007). In a ruling that is not challenged on appeal, the district court declined to retain supplemental jurisdiction over the state claim, dismissing it without prejudice.

With respect to the claim made under the Public Use Clause, the district court concluded, after a thorough and careful analysis, that no such claim was available. By the plaintiffs' own admission, the court noted, the Project here would serve several well-established public uses such as the redress of blight, the construction of a sporting arena, and the creation of new housing, including 2,250 new units of affordable housing. *Id.* at 286-87. The district court additionally held that a "pretext" argument provided a valid basis for a public-use challenge under the Supreme Court's decision in *Kelo v. City of New London*, 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), but was not available here because "even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project [were] 'mere pretexts' within the meaning of *Kelo*." *Id.* at 288. As to the plaintiffs' equal-protection claim, the district court determined that it was not viable because, *inter*

alia, any distinction between the plaintiffs and other persons has a rational basis. *Id.* at 291. As to the plaintiffs' due process claim, the district court held that such a claim was ill-fated in view of our holding in *Brody v. Village of Port Chester*, 434 F.3d 121 (2d Cir. 2005), in which we determined that section 207 of New York's Eminent Domain Procedure Law was sufficient to satisfy the requirements of due process. *Id.* This appeal followed.

III.

The primary contentions raised on appeal are that the district court overlooked substantial and specific allegations that Ratner is the sole beneficiary of the Project and that the public uses invoked by appellees are "pretexts" advanced by corrupt and coopted state officials. (Appellants also press their equal protection and due process claims, but give these appropriately short discussion.) The following passage from the appellants' brief captures the essence of their argument:

> Defendants' decision to take Plaintiffs' properties serves only one purpose: it allows Ratner to build a Project of unprecedented size, and thus reap a profit that Defendants, tellingly, have attempted to conceal at every turn. This is not merely favoritism of a particular developer. . . . Here, the "favored" developer is driving and dictating the process, with government officials at all levels obediently falling into line. . . . The imminent seizure of Plaintiffs' properties in the Takings Area selected by Ratner has been accomplished

> through a wholesale abdication of governmental responsibility. . . . That abdication has allowed Ratner to co-opt the power of eminent domain; and to wield it in service of his understandable desire to expand the Project to truly mammoth proportions, thus increasing the profit to himself, his companies and his shareholders.

Although the claim is far-reaching, the specific allegations underlying it are less so. Almost without exception, the appellants' arguments can be grouped into one of five discrete categories. First, the appellants point to a series of allegations that follow logically from the acknowledged fact that Ratner was the impetus behind the Project, *i.e.*, that he, not a state agency, first conceived of developing Atlantic Yards, that the Ratner Group proposed the geographic boundaries of the Project, and that it was his plan for the Project that the ESDC eventually adopted without significant modification. Second, the appellants emphasize certain allegations that relate not to the passage of the Project, but to some purported departures from convention in the process through which the MTA (which is not a defendant in this case) accepted a bid from the Ratner Group to develop land owned principally by the MTA. Third, certain allegations are invoked to suggest that the public uses being proffered by appellees (and relied upon by the district court) were *post hoc* justifications, for example, the charge in the appellants' brief that "Defendants never claimed that the Takings Area was blighted until years after the Project was officially announced and *Kelo* had been decided." Fourth, while conceding that the ESDC has at all times abided by the letter of the strict requirements of state law, the appellants

make various conclusory allegations in the complaint to suggest that the ESDC has nonetheless violated the spirit of these rules, to wit, that the "ESDC . . . engaged in a sham 'public' review process whose outcome was predetermined long before." Finally, the appellants make reference to several lawsuits that have been filed in state court in connection with this Project, but do not claim that any of those lawsuits addressed the issue of whether the public use of the Project was pretextual, which is the gravamen of the primary claim here.

IV.

We review the grant of a motion to dismiss under Rule 12(b)(6) *de novo,* "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.,* 282 F.3d 147, 152 (2d Cir. 2002). In setting forth the pleading standard for this cause of action, the district court looked for guidance to the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly,* --- U.S. ---, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which disavowed the oft-quoted statement from *Conley v. Gibson,*355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" 127 S.Ct. at 1968 (quoting *Conley,* 355 U.S. at 45-46, 78 S.Ct. 99). *Twombly* requires instead that the complaint's "[f]actual allegations be enough to raise a right to relief above the speculative level on the

assumption that all the allegations in the complaint are true." *Id.* at 1965 (internal citation omitted).

Because the disavowed language in *Conley* had been a part of our court's jurisprudence for decades, "'[c]onsiderable uncertainty' surrounds the breadth of the . . . decision." *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007) (quoting *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007)). The appellants concede on appeal that *Twombly* applies to the pleading standard in their action. Even though the precedents in this area "are less than crystal clear," *see Iqbal*, 490 F.3d at 178 (Cabranes, J., concurring), we need not take this occasion to contemplate the outer limits of the *Twombly* standard. As all parties acknowledge, at a bare minimum, the operative standard requires the "plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'" *See ATSI Commc'ns., Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (quoting *Twombly*, 127 S.Ct. at 1965). In view of what they have effectively conceded in prosecuting this lawsuit, the appellants cannot meet this standard.

V.

We have recognized that the power of eminent domain is "a fundamental and necessary attribute of sovereignty, superior to all private property rights." *Rosenthal & Rosenthal, Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 45 (2d Cir. 1985) (per curiam) (citing *Georgia v. City of Chattanooga*, 264 U.S. 472, 480, 44 S.Ct. 369, 68 L.Ed. 796 (1924) and *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 43

S.Ct. 442, 67 L.Ed. 809 (1923)). But as the Fifth Amendment ensures, this power is not without limits, among them what has come to be known as the public-use requirement.[4] Among its crucial protections, the Fifth Amendment provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. This language has long been understood to guarantee that "one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid." *Thompson v. Consol. Gas Utils. Corp.*, 300 U.S. 55, 80, 57 S.Ct. 364, 81 L.Ed. 510 (1937); *see also Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 245, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.").

But both in doctrine and in practice, the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts. Over the last century, reflecting the direction of Supreme Court case law, federal courts have had a much greater role in addressing what type of governmental action constitutes a taking and what level of compensation is just, leaving to legislatures to determine, in all but the most extreme cases, whether

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[4] This public-use requirement has been made applicable to the states through the Fourteenth Amendment. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 163-64, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998).

a taking fulfills the public-use requirement. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 Colum. L. Rev. 782, 803-10 (1995); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine,* 91 Colum. L. Rev. 473, 497 (1991). "There is, of course, a role for courts to play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power," *Midkiff,* 467 U.S. at 240, 104 S.Ct. 2321, but the Supreme Court has repeatedly "made clear that it is 'an extremely narrow' one." *Id.* (quoting *Berman v. Parker,* 348 U.S. 26, 32, 75 S.Ct. 98, 99 L.Ed. 27 (1954)).

Speaking for a unanimous Supreme Court in *Midkiff,* Justice O'Connor explained the rationale behind the very limited scope of federal judicial review in this area:

> Judicial deference is required because, in our system of government, legislatures are better able to assess what public purposes should be advanced by an exercise of the taking power. State legislatures are as capable as Congress of making such determinations within their respective spheres of authority. Thus, if a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.

467 U.S. at 244, 104 S.Ct. 2321 (internal citation omitted). The Supreme Court has therefore instructed lower courts not to "substitute [their] judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation.'" *Id.* at 241, 104 S.Ct. 2321 (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680, 16 S.Ct. 427, 40 L.Ed. 576 (1896)); *see also Kelo v. City of New London*, 545 U.S. 469, 480, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) ("Without exception, our cases have defined [public use] broadly, reflecting our longstanding policy of deference to legislative judgments in this field."); *Berman*, 348 U.S. at 32, 75 S.Ct. 98 ("[W]hen the legislature has spoken, the public interest has been declared in terms well-nigh conclusive."). To that end, we have said that our review of a legislature's public-use determination is limited such that "'where the exercise of the eminent domain power is rationally related to a conceivable public purpose,' . . . the compensated taking of private property for urban renewal or community redevelopment is not proscribed by the Constitution." *Rosenthal*, 771 F.2d at 46 (quoting *Midkiff*, 467 U.S. at 241, 104 S.Ct. 2321).

By way of brief illustration, in *Berman*, the Supreme Court rejected a Fifth Amendment challenge from the owner of a department store slated for condemnation as part of a larger redevelopment plan targeting blight in Washington, D.C. 348 U.S. at 31, 75 S.Ct. 98. The owner argued that because his particular store was not blighted, and his land would be transferred to a private developer, the taking violated the Public Use Clause. The Supreme Court disagreed, reasoning that "[o]nce the question of the public

purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Id.* at 35-36, 75 S.Ct. 98. In *Rosenthal,* applying *Berman,* we reached a similar result when we rejected a challenge to a plan redressing "the physical, social and economic blight that ha[d] afflicted the Times Square area of Manhattan" in spite of the fact that the private developer who had been selected to acquire the land in connection with the project was allegedly connected to then New York City Mayor Edward Koch. 771 F.2d at 45; *see also Rosenthal & Rosenthal, Inc. v. N.Y. State Urban Dev. Corp.,* 605 F. Supp. 612, 616 (S.D.N.Y. 1985).

With echoes of *Rosenthal,* the instant complaint calls the "alleged 'public benefits' . . . either wildly exaggerated or simply false. At best, [they] are incidental; at worst, they are nonexistent." Read carefully, however, the specific allegations in the complaint foreclose any blanket suggestion that the Project can be expected to result in no benefits to the public. *See Hirsch v. Arthur Andersen & Co.,* 72 F.3d 1085, 1092 (2d Cir. 1995) (noting that "conclusory allegations need not be credited . . . when they are belied by more specific allegations of the complaint"). Instead, their collective import is that the costs involved, measured in terms of either government spending or the impact the Project will have on the character of the neighborhood and its current residents, will dwarf whatever benefits result.

In other words, the appellants have effectively conceded what *Rosenthal* found to have been a

complete defense to a public-use challenge: that viewed objectively, the Project bears at least a rational relationship to several well-established categories of public uses, among them the redress of blight, the creation of affordable housing, the creation of a public open space, and various mass-transit improvements. But the plaintiffs then expend considerable effort explaining why these proffered public uses should nonetheless be rejected as "pretextual," not because they are false, but because they are not the real reason for the Project's approval.[5]

For example, on the subject of whether the Project will redress blight, the complaint alleges that this is a "pretext with no basis in fact," explaining that "far from being 'blighted,' the Takings Area [as distinct from the Renewal Area] rests smack in the middle of some of the most valuable real estate in Brooklyn." But the complaint does not allege, nor could it, that either the Renewal Area or the Takings Area are devoid of blight. The claim made is that the "City of New York . . . never declared that the Takings Area [as opposed to the Renewal Area] was 'blighted' and . . . never designated it for redevelopment" until three years after the project was announced, an implicit acknowledgment of the fact that the Renewal Area, which makes up "[n]early half" of the Project site, was first designated as blighted in 1968, a designation that has since been reaffirmed by New York City ten times, most recently in 2004. By the same token, although

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[5] The Complaint does not address the public open space rationale or the improvements to mass transit, nor does it in any way suggest that the Project will not include a stadium.

alleging that none of their own properties are blighted, the plaintiffs have conceded that even within the Takings Area, many properties are blighted and that the Project, as a whole, targets an area more than half of which is significantly blighted. The blight study commissioned by ESDC in 2006 determined that the conditions of blight extended well into the Takings Area, and the complaint alleges no facts to the contrary. The study concluded that "the non-rail yard portion of the project site is characterized by unsanitary and substandard conditions including vacant and underutilized buildings, vacant lots, irregularly shaped lots, building facades that are in ill-repair (e.g., crumbling brickwork, graffiti, flaking paint), and structures suffering from serious physical deterioration."

As to the issue of affordable housing, the complaint contends that "[f]undamentally, the Project is comprised of luxury housing" because 69% of the housing units will be "market rate, luxury units" and the remaining units will, for the most part, be introduced as part of the second phase of development, which is not guaranteed. But the complaint concedes in the ensuing allegations that at least 550 below-market units (roughly 5% of the total number of units proposed) are slated to be built in the first phase of development, and that roughly three times that number are slated for the next phase.[6] Viewed

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[6] The "affordable housing" discussed here refers to below-market housing for middle class occupants, not subsidized housing for the poor. No units are slated for households with incomes below $21,000.

carefully, the plaintiffs' contention is not that the Project will result in no below-market housing, but that when viewed "from the perspective of [potential] residents' income, the affordable [housing] units proposed from the Project will not remotely offset the impact of the luxury housing."

We need not go further. As *Berman* and *Rosenthal* illustrate, the redevelopment of a blighted area, even standing alone, represents a "classic example of a taking for a public use." *Rosenthal,* 771 F.2d at 46; *see also Kelo,* 545 U.S. at 483-84, 125 S.Ct. 2655. Nor does it matter that New York has enlisted the services of a private developer to execute such improvements and implement its development plan. Once we discern a valid public use to which the project is rationally related, it "makes no difference that the property will be transferred to private developers, for the power of eminent domain is merely the means to the end." *Rosenthal,* 771 F.2d at 46.

Similarly, we are without authority to provide the appellants the relief they seek based on the fact that their individual lots are not blighted, notwithstanding the understandable frustration this must cause them. The appellants do not dispute the presence of significant blight in the Takings Area and even greater blight in the adjacent Renewal Area. "[O]nce it has been shown that the surrounding area is blighted, the state may condemn unblighted parcels as part of an overall plan to improve a blighted area." *In re G. & A. Books, Inc.,* 770 F.2d 288, 297 (2d Cir. 1985). This is "because 'community redevelopment programs need not, by force of the Constitution, be on a piecemeal basis-lot by lot, building by building.'" *Rosenthal,* 771

F.2d. at 46 (quoting *Berman,* 348 U.S. at 35, 75 S.Ct. 98). The public-use requirement will be satisfied as long as the purpose involves "developing [a blighted] area to create conditions that would prevent a reversion to blight in the future." *Kelo,* 545 U.S. at 484 n. 13, 125 S.Ct. 2655 (emphasis omitted).

Lastly on this point, we must reject the argument that the ESDC is undeserving of such deference because it is merely a state agency deputized by the legislature. The Supreme Court has expressly extended deference in such matters to both "Congress and its authorized agencies." *Berman,* 348 U.S. at 33, 75 S.Ct. 98. In this context, "State legislatures are as capable as Congress of making such determinations within their respective spheres of authority." *Midkiff,* 467 U.S. at 244, 104 S.Ct. 2321. Indeed, *Midkiff* suggested it would be "ironic" if "state legislation [were] subject to greater scrutiny under the incorporated 'public use' requirement than is congressional legislation under the express mandate of the Fifth Amendment." *Id.* at 244 n. 7, 104 S.Ct. 2321. Nor do we see why it is relevant to the constitutional analysis that the ESDC, which in any case is not the only participant in this story, is organized under state law as a public-benefit corporation.[7] *See* N.Y. Unconsol. Law § 6254(1) (McKinney 2007) (providing

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[7] We also take judicial notice of the fact that on December 21, 2006, the New York State Public Authorities Control Board (a body that included then Governor George Pataki, the Speaker of the State Assembly, and the Majority Leader of the State Senate) issued a resolution approving of the Atlantic Yards Project. *See* Fed. R. Evid. 201.

that the ESDC "shall be a corporate governmental agency of the state, constituting a political subdivision and public benefit corporation").

VI.

Because it correctly rejected, on the basis of the complaint and the documents referenced therein, the argument that the Project was not rationally related to a public use, the district court concluded that the appellant's claim would have necessarily failed under the precedents established in *Berman* and *Midkiff*. But the district court's analysis did not end there because it determined that *Kelo* opened up a separate avenue for a takings challenge under which a plaintiff could claim a taking had been effectuated "'under the mere pretext of a public purpose, when [the] actual purpose was to bestow a private benefit.'" *Goldstein,* 488 F. Supp. 2d at 282 (quoting *Kelo,* 545 U.S. at 478, 125 S.Ct. 2655).

Primarily underlying this claim is a passing reference to "pretext" in the *Kelo* majority opinion in a single sentence. *See id.* at 478, 125 S.Ct. 2655 ("Nor would the City be allowed to take property under the mere pretext of a public purpose when its actual purpose was to bestow a private benefit."). Fortunately, the Supreme Court's guidance in *Kelo* need not be interpreted in a vacuum. *Kelo* posed a novel question of law precisely because the City of New London had "not [been] confronted with the need to remove blight." *Id.* at 482, 125 S.Ct. 2655. The Supreme Court granted certiorari on the limited question of "whether a city's decision to take property for the purpose of economic development satisfies the

'public use' requirement of the Fifth Amendment." *Id.* at 477, 125 S.Ct. 2655. Accordingly, the issue of pretext must be understood in light of both the holding of the case, which, in permitting a taking solely on the basis of an economic development rationale, reaffirmed the "longstanding policy of deference to legislative judgments in this field," *id.* at 480, 125 S.Ct. 2655, as well as the decision's self-identification with a tradition of public use jurisprudence that "[f]or more than a century . . . has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Id.* at 483, 125 S.Ct. 2655.[8]

Prior to *Kelo,* no Supreme Court decision had endorsed the notion of a "pretext" claim, although a few lower court cases contained language suggesting

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[8] We find it instructive that Justice O'Connor, in a dissent that was joined by three other Justices, maintained that the result reached by the majority represented a "mov[e] away from our decisions sanctioning the condemnation of harmful property use," contending that the Court's precedents stood only for the more limited proposition that "[b]ecause each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use." *Kelo,* 545 U.S. at 500-01, 125 S.Ct. 2655 (O'Connor, J., dissenting). Justice O'Connor therefore agreed without reservation that, in addition to redressing blight, the "sovereign may transfer private property to private parties . . . who make the property available for the public's use-such as with a *railroad*, a public utility, or a *stadium*." *Id.* at 498, 125 S.Ct. 2655 (emphasis added). As such, the instant challenge to the Project hinges on a proposition of law that would appear to fare no better under the *Kelo* dissent.

that a pretextual public use may be invalid. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency,* 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001) ("No judicial deference is required . . . where the ostensible public use is demonstrably pretextual"), *appeal dismissed as moot,* 60 Fed.App'x 123 (9th Cir. 2003); *Aaron v. Target Corp.,* 269 F. Supp. 2d 1162, 1177 (E.D. Mo. 2003) (same), *rev'd on other grounds,* 357 F.3d 768 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* 218 F. Supp. 2d 1203, 1229 (C.D. Cal. 2002) (same). *But see Montgomery v. Carter County, Tenn.,* 226 F.3d 758, 765-66 (6th Cir. 2000) (observing that "[v]ery few takings will fail to satisfy that standard [and] the examples suggested in the reported cases tend to be highly implausible hypotheticals"). These claims have come in all shapes and sizes. *See Cottonwood Christian Ctr.,* 218 F. Supp. 2d at 1228 (challenging taking where the "evidence does not necessarily support a finding of blight"); *99 Cents Only Stores,* 237 F. Supp. 2d at 1130 (challenging taking premised on the assumption that the departure of Costco would result in future blight); *Aaron,* 269 F. Supp. 2d at 1174-75 (entertaining claim of pretext where the requisite "findings of blight rested in part on the condition of [the beneficiary's own] personal property, and on the substandard condition of property [the beneficiary] was obligated to maintain under the various leases"). Tellingly, it appears that in each of these district court cases, the plaintiff had contested whether *any* public use would be served by the taking. [9]

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[9] In *99 Cents Only Stores,* for example, the challenged taking had been justified not by reference to any existing blight, but by a

In contrast, the particular kind of "pretext" claim the plaintiffs in this case advance bears an especially dubious jurisprudential pedigree: The plaintiffs have effectively acknowledged the Project's rational relationship to numerous well-established public uses, but contend that it is constitutionally impermissible nonetheless because one or more of the government officials who approved it was actually--and improperly--motivated by a desire to confer a private benefit on Mr. Ratner. The allegations in support of this claim primarily involve purported excesses in the costs of the plan as measured against its benefits. The appellants seek to use these alleged failings to gain discovery into the process by which the ESDC approved this Project. Among other things, as was made clear at oral argument, they seek depositions of pertinent government officials, along with their emails, confidential communications, and other pre-decisional documents. They also dispute various plausible assumptions underlying the Project's budget.

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professed concern for "future blight" that the court found may not qualify as a valid public use. *See* 237 F. Supp. 2d at 1130. Similarly, in *Cottonwood Christian Center,* the district court concluded that the "evidence does not necessarily support a finding of blight." *See* 218 F. Supp. 2d at 1228. In *Aaron v. Target,* the challenged development plan was proposed by Target to acquire its leases from its landlord. 269 F. Supp. 2d at 1175. The district court noted, *inter alia*, the suspicious timing of the blight study and the fact that the purported "findings of blight rested in part on the condition of Target's personal property, and on the substandard condition of property Target itself was obligated to maintain under the various leases." *Id.* at 1174-75.

Allowing such a claim to go forward, founded only on mere suspicion, would add an unprecedented level of intrusion into the process. *See Kelo,* 545 U.S. at 488, 125 S.Ct. 2655 (remarking that the "disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested parties be established before new construction can be commenced."). Prior to *Kelo,* it was well settled that "it is only the taking's purpose, and not its mechanics that must pass scrutiny under the Public Use Clause." *Midkiff,* 467 U.S. at 244, 104 S.Ct. 2321.

Accordingly, we must reject the notion that, in a single sentence, the *Kelo* majority sought *sub silentio* to overrule *Berman, Midkiff,* and over a century of precedent and to require federal courts in all cases to give close scrutiny to the mechanics of a taking rationally related to a classic public use as a means to gauge the purity of the motives of the various government officials who approved it. *See Kelo,* 545 U.S. at 483, 125 S.Ct. 2655 (characterizing more than a century of Public Use Clause jurisprudence as having "wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power"); *Midkiff,* 467 U.S. at 241, 104 S.Ct. 2321 ("[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause."); *Berman,* 348 U.S. at 32, 75 S.Ct. 98 ("The role of the judiciary in determining whether [the takings] power is being exercised for a public purpose

is an extremely narrow one"); *United States ex rel. Tenn. Valley Auth. v. Welch,* 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946) ("Any departure from this judicial restraint would result in courts deciding on what is and is not a governmental function . . . a practice which has proved impracticable in other fields."); *Old Dominion Land Co. v. United States,* 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925); ("[T]he declaration by Congress of what it had in mind . . . . is entitled to deference until it is shown to involve an impossibility."); *United States v. Gettysburg Elec. Ry. Co.,* 160 U.S. 668, 680, 16 S.Ct. 427, 40 L.Ed. 576 (1896) ("[W]hen the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation."); *cf. Franco v. Nat'l Capital Revitalization Corp.,* 930 A.2d 160, 171 (D.C. 2007) (recognizing that in this context, courts must be "especially careful not to indulge baseless, conclusory allegations that the legislature acted improperly").

We do not read *Kelo*'s reference to "pretext" as demanding, as the appellants would apparently have it, a full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise as fraught with conceptual and practical difficulties as with state-sovereignty and separation-of-power concerns. Beyond being conclusory, the claim that the "decision to take Plaintiffs' properties serves only one purpose" defies both logic and experience. "Legislative decisions to invoke the power to condemn are by their nature political accommodations of competing concerns." *Brody v. Vill. of Port Chester,* 434 F.3d 121,

136 (2d Cir. 2005). And as Justice Scalia observed in words, if anything, more pertinent in this case:

> [W]hile it is possible to discern the objective "purpose" of a statute (i.e., the public good at which its provisions appear to be directed) . . . . discerning the subjective motivation of [a legislative body] is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite. . . . To look for *the sole purpose* of even a single legislator is probably to look for something that does not exist.

Edwards v. Aguillard, 482 U.S. 578, 636-37, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (Scalia, J., dissenting) (emphasis in original). Thus, while "a legislature may juggle many policy considerations in deciding whether to condemn private property," the task of a federal court reviewing the constitutionality of such a taking should be one of "patrolling the borders" of this decision, viewed objectively, not second-guessing every detail in search of some illicit improper motivation. *See Brody,* 434 F.3d at 135.

We reach this conclusion preserving the possibility that a fact pattern may one day arise in which the circumstances of the approval process so greatly undermine the basic legitimacy of the outcome reached that a closer *objective* scrutiny of the justification being offered is required. In this area, "hypothetical cases . . . can be confronted if and when they arise." *Kelo,* 545 U.S. at 487, 125 S.Ct. 2655; *see also id.* at 487 n. 19, 125 S.Ct. 2655. But we hold today that where, as here, a redevelopment plan is justified in reference to

several classic public uses whose objective basis is not in doubt, we must continue to adhere to the *Midkiff* standard, *i.e.*, that the Atlantic Yards Project:

> may not be successful in achieving its intended goals. But 'whether *in fact* the [Project] will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] *rationally could have believed* that the [taking] would promote its objective.'

Midkiff, 467 U.S. at 242, 104 S.Ct. 2321 (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671-672, 101 S.Ct. 2070, 68 L.Ed.2d 514 (1981) (emphasis in *Midkiff*)).

The appellants urge that we reach a contrary result because, unlike in *Kelo*, the Atlantic Yards Project was allegedly proposed in the first instance by Ratner himself. The sequence of events was certainly one of the factors considered in *Kelo*. However, here, New York long ago decided by statute not to restrict the ESDC's mandate to those "projects in which it is the prime mover." *E. Thirteenth St. Cmty. Ass'n v. N.Y. State Hous. Fin. Agency*, 218 A.D.2d 512, 630 N.Y.S.2d 517, 518 (App. Div. 1995); *see also* N.Y. Unconsol. Law § 6252 (McKinney 2007) (providing the ESDC should "encourag[e] maximum participation by the private sector of the economy"). And as *Kelo* reaffirmed, the mere fact that a private party stands to benefit from a proposed taking does not suggest its purpose is invalid because "[q]uite simply, the government's pursuit of a public purpose will often benefit individual private parties." *Kelo*, 545 U.S. at 485, 125 S.Ct. 2655.

Moreover, in this case, substantial factors not present in *Kelo* support our result.[10] As we have already illustrated, private economic development is neither the sole, nor the primary asserted justification for the Atlantic Yards Project. The appellants have conceded, if only reluctantly, that the Atlantic Yards Project will target a long-blighted area, result in the construction of a publicly owned (albeit generously leased) stadium, create a public open space, increase

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[10] Justice Kennedy, who joined with the majority opinion, nonetheless wrote separately to state his view that a "court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo,* 545 U.S. at 491, 125 S.Ct. 2655 (Kennedy, J., concurring). Justice Kennedy may well have intended this caveat to apply exclusively to cases where the *sole*ground asserted for the taking was economic development. He framed the issue by explaining his "agreement with the Court that a presumption of invalidity is not warranted for economic development takings in general, or for the particular takings at issue in this case." *Id.* at 493, 125 S.Ct. 2655. In any case, Justice Kennedy has analogized the sort of heightened review he envisions to a more searching "rational-basis review under the Equal Protection Clause." *Id.* at 491, 125 S.Ct. 2655 (citing *Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 446-47, 105 S.Ct. 3249, 87 L.Ed.2d 313 (rational basis case); *Dep't of Agric. v. Moreno,* 413 U.S. 528, 533-36, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973) (rational basis case)). None of the Equal Protection Clause cases Justice Kennedy relied upon involved deposing legislators or subpoenaing their confidential emails. Accordingly, even assuming, *arguendo,* we were to apply a version of Justice Kennedy's standard here, we would scrutinize objectively and find no "plausible" accusations of favoritism.

the quantity of affordable housing, and render various improvements to the mass transit system. Furthermore, they have failed to allege any specific examples of illegality in the elaborate process by which the Project was approved, any specific illustration of improper dealings between Mr. Ratner and the pertinent government officials, or any specific defect in the Project that would be so egregious as to render it, on any fair reading of precedent, "palpably without reasonable foundation." *Midkiff,* 467 U.S. at 241, 104 S.Ct. 2321.

This case has been very well litigated on both sides. At the end of the day, we are left with the distinct impression that the lawsuit is animated by concerns about the wisdom of the Atlantic Yards Project and its effect on the community. While we can well understand why the affected property owners would take this opportunity to air their complaints, such matters of policy are the province of the elected branches, not this Court.

VII.

Finally, we must reject the due process and equal protection claims brought by the appellants for essentially the reasons stated by the district court. Accordingly, for the foregoing reasons, we hereby AFFIRM the judgment of the district court dismissing the federal claims with prejudice and the state claim without prejudice.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Nos. 06-CV-5827 (NGG)(RML)
07-CV-152 (NGG)(RML)

[Filed June 6, 2007]

Daniel Goldstein, *et al.*,
Plaintiffs,

-against-

George E. Pataki, *et al.*,
Defendants.

Aaron Piller, *et al.*,
Plaintiffs,

-against-

George E. Pataki, *et al.*,
Defendants.

MEMORANDUM & ORDER

NICHOLAS G. GARAUFIS, District Judge.

Before the court are all parties' objections to the recommendation of The Honorable Robert M. Levy, United Stated Magistrate Judge, that the court dismiss this consolidated case. For the reasons set forth in this Memorandum and Order, this court accepts and adopts those recommendations in part, rejects those recommendations in part, and dismisses this consolidated case in its entirety.

I. Factual Background

Because Defendants move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the court must accept all factual allegations in Plaintiffs pleadings and must draw inferences from those allegations in the light most favorable to the Plaintiffs. *U.S. v. The Baylor Univ. Med. Ctr.*, 469 F.3d 263, 267 (2d Cir. 2006) (Rule 12(b)(6)); *McGinty v. State*, 193 F.3d 64, 68 (2d Cir. 1999) (Rule 12(b)(1)).

A. The Parties

1. Plaintiffs

Each Plaintiff owns or rents real estate in Brooklyn, New York located on land intended for use in the Atlantic Yards Arena and Development Project, which is described below.

2. The State Defendants

Defendant New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is an agency of New York State that was, at all relevant times, controlled by Defendant George E. Pataki, the Governor of New York State from 1995 until December 2006, and Defendant Charles A. Gargano, the Chief Executive Officer of the ESDC during that period. These Defendants are collectively referred to as the "State Defendants."

3. The FCRC Defendants

Defendant Forest City Ratner Companies ("FCRC") is a New York corporation with a principal place of business in New York. Defendant Bruce C. Ratner is the President and Chief Executive Officer of FCRC. Defendant James P. Stuckey is an Executive Vice President of FCRC and the President of FCRC's Atlantic Yards Development Group. Defendant Forest City Enterprises ("FCE") is a Delaware corporation with a principal place of business in Ohio. Defendant Ratner Group, Inc. is a New York corporation with a principal place of business in New York. Defendants BR FCRC, LLC; Brooklyn Arena, LLC; Atlantic Yards Development Co. LLC; BR Land, LLC; and FCR Land, LLC are New York limited-liability companies with principal places of business in New York. These Defendants are collectively referred to as the "FCRC Defendants."

4. The City Defendants

Defendant Michael Bloomberg has been the Mayor of Defendant New York City from 2002 to the present. Defendant Daniel L. Doctoroff has been a Deputy Mayor of New York City from 2002 to the present. Defendant New York City Economic Development Corporation ("EDC") is a New York non-profit corporation with a principal place of business in New York. Defendant Andrew M. Alper was President of the EDC for a portion of the period in which Plaintiffs' claims arose. Defendant Joshua Sirefman was Acting President of the EDC for a portion of the period in which Plaintiffs' claims arose. These Defendants are collectively referred to as the "City Defendants."

B. The Atlantic Yards Arena and Development Project

FCRC intends to build the Atlantic Yards Arena and Development Project (the "Project") on twenty-two acres of land in Brooklyn, New York bounded generally on the north by Atlantic Avenue, the south by Dean Street, the east by Vanderbilt Avenue, and the west by Fourth Avenue (the "Project Area"). The Project is planned to consist of sixteen towers and 8.6 million square feet of floor space, including a sports arena, 6,860 housing units, approximately 600,000 square feet of office space, and a hotel. The Project Area encompasses both land containing property owned and rented by Plaintiffs (the "Takings Area") and land in which Plaintiffs have no interest, which consists primarily of the Vanderbilt Rail Yard site owned by the Metropolitan Transit Authority ("MTA") (the "Non-Takings Area"). The Vanderbilt Rail Yard is part of the

Atlantic Terminal Urban Renewal Area ("ATURA"), which New York City has designated as blighted ten times, first in 1968 and most recently in 2004. In all, approximately sixty-three percent of the Project Area is blighted.

FCRC conceived of the Project in or before the summer of 2002 and announced it publicly on December 11, 2003. In the interim, it purchased the New Jersey Nets basketball franchise, which it intends to move into the sports arena that is part of the Project, and solicited and received the support of Governor Pataki, Mayor Bloomberg, and Deputy Mayor Doctoroff. In December 2003, Mayor Bloomberg announced that FCRC would develop the Project with the ESDC. On February 18, 2005, Defendants memorialized their plans for the Project in two memoranda of understanding.

Prior to September 2003, the MTA stated more than once that it had sold to FCRC the right to develop the Vanderbilt Rail Yard. In September 2003, the MTA retracted those statements. On February 24, 2005, the MTA entered an agreement with FCRC indicating that the MTA had not sold to FCRC the right to develop the Vanderbilt Rail Yard. On May 25, 2005, the MTA issued a request for proposals ("RFP") to purchase the right to develop the Vanderbilt Rail Yard. The RFP provided that proposals must include twenty-year profit-and-loss projections. Only two entities submitted proposals. The first, FCRC, offered to pay $50 million and did not submit a twenty-year profit-and-loss projection. The second, the Extell Development Company ("Extell"), offered to pay $150 million and submitted the required profit-and-loss projection.

Extell's proposal, unlike FCRC's, did not require the taking of any private property.

On July 27, 2005, the MTA granted FCRC the exclusive right to negotiate, during a forty-five-day period, for the right to develop the Vanderbilt Rail Yard. On September 14, 2005, the MTA announced that it would sell that development right to FCRC for $100 million.

C. New York's Eminent Domain Procedure Law

Article Two of New York's Eminent Domain Procedure Law ("EDPL") sets forth procedures for determining the need for and location of public projects prior to the condemnation of private property. Defendants have availed themselves of those procedures, as described below. Article Four of the EDPL sets forth the procedures governing post-condemnation acquisition of private property for public projects. Defendants have not yet availed themselves of those procedures.

1. Article Two

New York law requires a condemnor[1] to conduct a pre-acquisition public hearing "in order to inform the public [of the proposed public project] and to review the public use to be served by a proposed public project." EDPL § 201. At the Section 201 hearing, the

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[1] A "condemnor" is "any entity vested with the power of eminent domain." EDPL § 103(D).

condemnor must announce the purpose and location of the proposed project, and those in attendance must be given an opportunity to present oral or written statements and to submit other documents concerning the project. EDPL § 203. The hearing must be conducted on the record, and the record must include a transcript of all oral statements made at the hearing and copies of all written statements and other documents submitted at the hearing. *Id.*; EDPL § 207(A) (indicating that the record includes "a written transcript" of the public hearing).

The ESDC issued a Notice of Public Hearing on July 24, 2006 and held a public hearing on August 23, 2006. In addition, on September 12, 2006, the ESDC held a community forum to discuss the Project.

Within ninety days of a public hearing, a condemnor must publish a synopsis of its determination and findings. EDPL § 204(A). The synopsis must specify (1) the public use, benefit, or purpose to be served by the proposed public project; (2) the location of the project and the reason(s) that location was selected; (3) the general effect of the project on the environment and residents of the locality; and (4) other factors the condemnor considers relevant. EDPL § 204(B). The ESDC issued its determination and findings on December 8, 2006, indicating that ESDC should and would use its power of condemnation to acquire Plaintiffs' properties. (Determination and Findings (12/15/06 Kraus Decl. (Docket No. 51) Ex. E) (available at http:// www.empire .state.ny.us/pdf/AtlanticYards/Determination% 20and% 20Findings.pdf (last visited June 5, 2007)).)

The ESDC identified the following as the public purposes to be served by the Project:

(1) The elimination of blight in both the Takings and Non-Takings Areas (Determination and Findings) (*id.* at 1, 4, 5), which is the purported "principal" public purpose of the Project (*id.* at 4);

(2) An arena to be used by a major-league sports franchise, for athletic contests featuring local academic institutions, and for other entertainment and civic events (*id.* at 5);

(3) Approximately 2,250 units of "affordable" rental housing and between 3,075 and 4,180 units of "market rate" housing (*id.*);

(4) Between 336,000 and 1,606,000 square feet of office space (*id.*);

(5) "Possibly" a hotel (*id.*);

(6) Eight acres of publicly accessible space (*id.*);

(7) Ground-level retail space "to activate the street frontages" (*id.*);

(8) "Community facility spaces", including those offering child care and "youth and senior center service" (*id.* at 5-6);

(9) A facility for the Long Island Railroad to store, clean, and inspect its trains (*id.* at 6);

(10) An additional entrance to an already existing subway station (*id.*);

(11) "[S]ustainability and green design" (*id.*); and

(12) "[E]nvironmental remediation of the Project Site" (*id.*).

Plaintiffs expect that their properties will be condemned and seized "in short order" in order to effectuate the Project.

An aggrieved person may seek judicial review of the condemnor's determination and findings within thirty days of their publication. EDPL § 207(A). The EDPL provides that the aggrieved person may sue only in the Appellate Division of New York Supreme Court and only in the Department of the Appellate Division that embraces the county in which the property at issue is located. *Id.* Judicial review is conducted "on the record," *i.e.*, based on the record of the Section 201 hearing and the Section 204 determination and findings. *Id.*

The Appellate Division's review is limited to whether (1) the proceeding was in conformity with the federal and state constitutions; (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority; (3) the condemnor's determination and findings were made in accordance with procedures set forth in Article Two of the EDPL and with Article Eight of the New York Environmental Conservation Law; and (4) a public use, benefit, or purpose will be served by the proposed acquisition. EDPL § 207(C). The decision of the Appellate Division

may be appealed to the New York Court of Appeals. EDPL § 207(B).

259 Plaintiffs have chosen to bring their Section 207 claim before this court, pursuant to the doctrine of supplemental jurisdiction, 28 U.S.C. § 1367, rather than before the Appellate Division.

2. Article Four

When, as in this case, the condemnor is an entity other than the State of New York, the condemnor must file a petition in New York State Supreme Court in order to acquire the condemned property. EDPL §§ 402(B), 501. This petition must be filed within three years of the latest among (1) publication of the condemnor's Section 204 determination and findings, (2) the date of the order or completion of the procedure that constitutes the basis of an exemption to Section 204 under EDPL § 206, and (3) entry of the final order or judgment based on Section 207 judicial review. EDPL § 401(A).

The condemnor's petition must set forth (a) the basis for compliance with Article Two of the EDPL, including a copy of its determination and findings; (b) an acquisition map, including the names and places of residence of condemnees; (c) a description of the real property to be acquired and its location; (d) the public use, benefit, or purpose for which the property is required; and (e) a request that the court direct entry of an order authorizing the filing of the acquisition map. EDPL § 402(B)(3). The condemnor must notify the public of the petition at least twenty days before its

return date. EDPL § 402(B)(2). Any condemnee may file an answer to the petition. EDPL § 402(B)(4).

Should the court find that the procedural requirements of New York's Eminent Domain Procedure law have been met, it must enter an order granting the petition. EDPL § 402(B)(5). When the condemnor files such an order with the appropriate county clerk or register, "the acquisition of the property . . . shall be complete and title to such property shall then be vested in the condemnor." *Id.* After title vests in the condemnor, a condemnee may sue for just compensation. *See generally* EDPL Art. 5.

As of the date the Amended Complaint was filed, the FCRC had not commenced Article Four proceedings to acquire Plaintiffs' property.

II. Procedural History

Before the court are two cases that have been consolidated.

The first case, 06-CV-5827 (the "Goldstein case"), was filed on October 26, 2006. Plaintiffs to the Goldstein case (collectively, "Goldstein") initially asserted three causes of action, each pursuant to 42 U.S.C. § 1983 and the United States Constitution: (1) a violation of the Takings Clause of the Fifth Amendment, (2) a violation of the Equal Protection clause of the Fourteenth Amendment, and (3) a violation of the Due Process clause of the Fourteenth Amendment. On December 15, 2006, all Defendants moved to dismiss the Goldstein case. On January 5, 2007, Goldstein responded to Defendants' motions to

dismiss and filed an Amended Complaint, which added as a fourth cause of action a supplemental claim against the ESDC pursuant to EDPL § 207.

On January 11, 2007, the second case, 07-CV-152 (the "Piller case"), was filed by Aaron Piller and Rockwell Property Management, LLC (together, "Piller"). Piller asserted the same four causes of action as Goldstein and sued the same Defendants.

On January 19, 2007, all Defendants filed reply papers in support of their motions to dismiss the Goldstein case. Also on that date, the ESDC filed a motion to dismiss Goldstein's fourth cause of action. On January 26, 2007, Goldstein responded to the ESDC's motion to dismiss the fourth cause of action. On February 1, 2007, the ESDC filed reply papers in support of its motion to dismiss the fourth cause of action.

On February 7, 2007, Judge Levy, to whom I referred Defendants' motions to dismiss the Goldstein case, heard oral argument regarding those motions. On February 23, 2007, Judge Levy recommended that I dismiss the Goldstein case on the ground of *Burford* abstention. (Report and Recommendations (Docket No. 83[2]) at 33-42.) Judge Levy also recommended that I decline to dismiss the Goldstein case on the grounds of ripeness and *Younger* abstention. (*Id.* at 14-33.) Judge Levy did not consider whether Goldstein stated a claim upon which relief could be granted. (*Id.* at 42.)

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[2] Citations to Docket Numbers refer to the docket in the Goldstein case (06-CV-5827) unless otherwise indicated.

On March 8, 2007, the Goldstein and Piller cases were consolidated. (Stipulation and Order (Docket No. 85).) The parties agreed, and this court so ordered, that "Defendants' pending motions to dismiss in the Goldstein Action, and the Goldstein Plaintiffs' opposition thereto, shall be and hereby are deemed filed in the Piller Action, and the disposition of Defendants' motions in the Goldstein Action shall be deemed to apply to the Piller Action with equal force." (*Id.* ¶ 2.)

On March 9, 2007, the parties filed objections to Judge Levy's Report and Recommendations. On March 23, 2007, the parties responded to each other's objections. On March 28, 2007, the parties filed reply papers in support of their objections. On March 30, 2007, this court heard oral argument regarding those objections. On May 22, 2007, Governor Pataki filed a supplemental letter. On May 25, 2007, the ESDC filed a supplemental letter. On June 5, 2007, Plaintiffs filed a supplemental letter.

This court has considered all arguments submitted by the parties to this case.

III. Analysis

The parties collectively challenge all of Judge Levy's recommendations. I must therefore consider *de novo* Defendants' motions to dismiss. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

I will first address *Burford* abstention, which Judge Levy recommended I accept as a ground for dismissal. I decline to dismiss on that ground. I will then address

ripeness and *Younger* abstention, which Judge Levy recommended I reject as grounds for dismissal. I accept and adopt those recommendations. I will then consider whether Plaintiffs have stated a claim upon which relief can be granted. I find that they have not. I therefore grant Defendants' motions to dismiss.

A. *Burford* Abstention

Defendants argue, relying on the doctrine established in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943) and its progeny, that the court must abstain from hearing this case. The Supreme Court has summarized *Burford* abstention as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

New Orleans Pub. Serv., Inc. v. Council of City of New Orleans, 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (citation and quotation marks omitted) (hereinafter, "NOPSI"). Defendants believe, and Judge Levy recommends that I find, that this case falls into the second *NOPSI* category. (ESDC's 12/15/06

Br. (Docket No. 52) at 26-27; ESDC's 3/23/07 Br. (Docket No. 95) at 1, 4; FCRC's 3/23/07 Br. (Docket No. 93) at 5; City Defs.' 3/23/07 Br. (Docket No. 92) at 2; Report and Recommendation (Docket No. 83) at 33-42.)

The court declines to abstain under *Burford*. Such abstention would be inappropriate because federal-court review of the questions presented in this and similar cases will not disrupt New York's effort to establish a coherent eminent-domain policy. To understand why, it is necessary to consider carefully the facts of *Burford*,[3] the reasons abstention was appropriate in *Burford* and the one other Supreme Court case approving of such abstention, and the reasons *Burford* abstention was improper in all other cases in which the Supreme Court considered it.

1. Supreme Court Cases Approving *Burford* Abstention

a. *Burford v. Sun Oil Co.*

Although federal courts "are under a virtually unflagging obligation to exercise the jurisdiction given them . . . there are exceptional circumstances where a federal court may decline to decide a dispute properly before it." *Cannady v. Valentin*, 768 F.2d 501, 503 (2d Cir. 1985); *see also West v. Vill. of Morrisville*, 728 F.2d

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[3] Although *Burford* is cited as the origin of both categories of cases identified in *NOPSI*, *Burford* itself fits into only the second of those categories, which is the category at issue in this case. *Colo. River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 814-15, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976)

130, 135 (2d Cir. 1984). "Abdication of the obligation to decide cases can be justified under [abstention] doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." *Colo. River,* 424 U.S. at 813-14, 96 S.Ct. 1236 (citations and quotation marks omitted); *see also Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 716, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996); *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 189, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959).

In *Burford,* the Supreme Court affirmed a district court's decision to abstain from hearing a case involving a question of state law because "[c]onflicts in the interpretation of [the] state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." *Burford,* 319 U.S. at 334, 63 S.Ct. 1098. The state law at issue in *Burford* was "the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Id.* at 318, 63 S.Ct. 1098 (citation and quotation marks omitted). The plaintiff, the Sun Oil Company, contested a decision of the Texas Railroad Commission ("Commission") to permit Burford to drill four oil wells on a portion of a large oil field in East Texas. *Id.* at 316-17, 63 S.Ct. 1098. The Supreme Court described that field as follows:

> [It] is one of the largest in the United States. It is approximately forty miles long and between five and nine miles wide, and over 26,000 wells have been drilled in it. Oil exists in the pores and crevices of rocks and sand and moves through these channels. A large area of this sort is called a pool or reservoir and the East Texas field is a giant pool. The chief forces causing oil to move are gas and water, and it is essential that the pressures be maintained at a level which will force the oil through wells to the surface. As the gas pressure is dissipated, it becomes necessary to put the well on the pump at great expense; and the sooner the gas from a field is exhausted, the more oil is irretrievably lost. Since the oil moves through the entire field, one operator can not only draw the oil from under his own surface area, but can also, if he is advantageously located, drain oil from the most distant parts of the reservoir. The practice of attempting to drain oil from under the surface holdings of others leads to offset wells and other wasteful practices; and this problem is increased by the fact that the surface rights are split up into many small tracts. There are approximately nine hundred operators in the East Texas field alone.

Id. at 318-19, 63 S.Ct. 1098 (citations, quotation marks, and footnotes omitted).

The Court observed that for a variety of "reasons based on geological realities," including those just described, "each oil and gas field must be regulated as a unit for conservation purposes." *Id.* at 319, 63 S.Ct.

1098. The Texas state legislature delegated such regulation to the Texas Railroad Commission ("Commission"):

> The Commission, in cooperation with other oil producing states, has accepted State oil production quotas and has undertaken to translate the amount to be produced for the State as a whole into a specific amount for each field and for each well. These judgments are made with due regard for the factors of full utilization of the oil supply, market demand, and protection of the individual operators, as well as protection of the public interest. As an essential aspect of the control program, the State also regulates the spacing of wells. The legislature has disavowed a purpose of requiring that the separately owned properties in any pool should be unitized under one management, control or ownership and the Commission must thus work out the difficult spacing problem with due regard for whatever rights Texas recognizes in the separate owners to a share of the common reservoir. At the same time it must restrain waste, whether by excessive production or by the unwise dissipation of the gas and other geologic factors that cause the oil to flow.

Id. at 320-22, 63 S.Ct. 1098 (citations and quotation marks omitted).

In order to achieve the desired level of production, avoid waste, and recognize separate owners' shares of the common reservoir, the Commission adopted Rule 37, which provided for minimum spacing between

wells, permitted exceptions where necessary to prevent waste, and aimed to allow each surface owner to recover oil and gas "substantially equivalent in amount to the recoverable oil and gas under his land." *Id.* at 322, 63 S.Ct. 1098. The ostensible simplicity of this goal was "delusive," however, because nobody could be certain just how much oil was present under the land of each surface holder. *Id.* at 323, 63 S.Ct. 1098.

Because the questions of waste and confiscation were interrelated, such that "decision of one of the questions necessarily involve[d] recognition of the other," *id.*, and because "over two-thirds of the wells in the East Texas field exist[ed] as exceptions," *id.* at 324, 63 S.Ct. 1098, the Commission was charged with balancing private rights against each other and, simultaneously, against the public interest:

> The standards applied by the Commission in a given case necessarily affect the entire state conservation system. Of far more importance than any other private interest is the fact that the over-all plan of regulation, as well as each of its case by case manifestations, is of vital interest to the general public which must be assured that the speculative interests of individual tract owners will be put aside when necessary to prevent the irretrievable loss of oil in other parts of the field. The Commission in applying the statutory standards of course considers the Rule 37 cases as a part of the entire conservation program with implications to the whole economy of the state.

Id. at 324-25, 63 S.Ct. 1098.

In order to balance those interests, Texas not only provided for centralized resolution of exception disputes by the Commission, but for centralized judicial review of the Commission's decisions:

> The Commission orders may be appealed to a State district court in Travis County, and are reviewed by a branch of the Court of Civil Appeals and by the State Supreme Court. While the constitutional power of the Commission to enforce Rule 37 or to make exceptions to it is seldom seriously challenged, the validity of particular orders from the standpoint of statutory interpretation may present a serious problem, and a substantial number of such cases have been disposed of by the Texas courts which alone have the power to give definite answers to the questions of State law posed in these proceedings.

Id. at 325, 63 S.Ct. 1098 (citations omitted). Concentration of challenges to Commission orders in Travis County was intended to prevent the "interminable confusion [that] would result" if the Commission's decisions could be attacked in various courts. *Id.* at 326, 63 S.Ct. 1098. In addition, "[c]oncentration of judicial supervision of Railroad Commission orders permits the state courts, like the Railroad Commission itself, to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field." *Id.*

Sun Oil sued in federal court rather than Travis County, relying for jurisdiction on the parties' diversity

of citizenship and the contention that the Commission's order denied Sun Oil due process. *Id.* at 317, 63 S.Ct. 1098. The Supreme Court framed the question presented to it as, "Assuming that the federal district court had jurisdiction, should it, as a matter of sound equitable discretion, have declined to exercise that jurisdiction here?" *Id.* at 318, 63 S.Ct. 1098. The Court answered that question in the affirmative, concluding that "sound respect for the independence of state action require[d] the federal equity court to stay its hand." *Id.* at 334, 63 S.Ct. 1098.

Although the Court did not reduce its reasoning to a simple formula, it made clear that its conclusion was based on five factors: (1) facts about the East Texas oil field, (2) Texas's centralized approach to regulating oil drilling, (3) Texas's centralized system for reviewing regulatory decisions, (4) the dangers of federal review of regulatory decisions, and (5) the nature of the question presented in the case. I will briefly elaborate upon each.

i. The East Texas Oil Field

The first factor was the East Texas oil field. The Supreme Court observed that the field had to be regulated as a single unit because each operator could, if advantageously located, draw oil from underneath land other than his own, a fact that had led to "offset wells" and other wasteful practices. *Id.* at 319, 323, 63 S.Ct. 1098. In addition, the Court noted that oil was vitally important to Texas, which drew much of its revenue from taxing the oil industry-a circumstance that would exacerbate the harm from wasted oil. *Id.* at 320, 324, 63 S.Ct. 1098. And wasted oil was not a mere

theoretical concern: "the sooner the gas from a field is exhausted, the more oil is irretrievably lost." *Id.* at 319, 63 S.Ct. 1098. For that reason, any failure to award drilling rights where oil existed, and even any slight delay in awarding such rights, would rob consumers of oil and Texas of tax revenue.

ii. Texas's Centralized Approach to Regulating Oil Drilling

The second factor the Court considered was "the general regulatory system devised for the conservation of oil and gas in Texas, an aspect of as thorny a problem as has challenged the ingenuity and wisdom of legislatures." *Id.* at 318, 63 S.Ct. 1098 (citation and quotation marks omitted). The Court noted that Congress had chosen not to regulate oil fields, *Id.* at 319, 63 S.Ct. 1098, and that "the State's attempts to control the flow of oil and at the same time protect the interest of the many operators have from time to time been entangled in geological-legal problems of novel nature," *id.* at 320, 63 S.Ct. 1098.

The Court then observed that in order to solve the problem of oil-field regulation, the Texas legislature gave the Commission "broad discretion in administering the law." *Id.* at 320, 63 S.Ct. 1098 (citation and quotation marks omitted). The Commission proceeded by "accept[ing] State oil production quotas and [ ] undertak[ing] to translate the amount to be produced for the State as a whole into a specific amount for each field and for each well." *Id.* at 320, 63 S.Ct. 1098; *see also id.* at 320 n. 12, 63 S.Ct. 1098. "At the same time [the Commission was required to] restrain waste, whether by excessive

production or by the unwise dissipation of the gas and other geological factors that cause the oil to flow." *Id.* at 322, 63 S.Ct. 1098. And "since the waste and confiscation problems are as a matter of physical necessity so closely interrelated, decision of one of the questions necessarily involves recognition of the other." *Id.* at 323, 63 S.Ct. 1098.

The Court found that the Commission's broad discretion was necessary in order to balance private interests against the public interest:

> [Cases] involving "confiscation", are not mere isolated disputes between private parties. Aside from the general principles which may evolve from these proceedings, the physical facts are such that an additional permit may affect pressure on a well miles away. The standards applied by the Commission in a given case necessarily affect the entire state conservation system.

Id. at 324, 63 S.Ct. 1098.

iii. Texas's Centralized System of Judicial Review of Regulatory Decisions

The third factor upon which the Supreme Court relied was the Texas state legislature's decision to concentrate a "system of thorough judicial review" of Commission decisions in a single Texas court located in Travis County. *Id.* at 325, 63 S.Ct. 1098. Such concentration served the purposes of (1) avoiding inconsistent decisions on appeal from Commission

orders, which would lead to "intolerable confusion" and, potentially, wasted oil and tax revenue, and (2) allowing the court that reviewed Commission decisions "to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field." *Id.* at 325, 327, 63 S.Ct. 1098.

The Court observed that the Travis County court, utilizing its specialized knowledge, acted as a "working partner" with the Commission and had some arguably "legislative powers," *id.* at 325-27, 63 S.Ct. 1098, and that its review of the Commission's decisions was "expeditious and adequate," *id.* at 334, 63 S.Ct. 1098.

iv. The Dangers of Federal Review of Regulatory Decisions

Fourth, the Court relied on actual and expected problems arising from federal review of Commission decisions. It first found that the "confusion" sought to be avoided by Texas's scheme of centralized judicial review had actually resulted when federal courts had reviewed Commission decisions. The cases before those federal courts would have been better brought in state court because they "dealt primarily with the interpretation of state law, some of it state law fairly remote from oil and gas problems." *Id.* at 331, 63 S.Ct. 1098. The federal courts misinterpreted state law and so disrupted Texas's scheme that state laws were amended, special sessions of the state legislature were called, and the Governor of Texas imposed martial law. *Id.* at 327-33 & n. 26, 63 S.Ct. 1098. In addition, the Supreme Court found that such confusion would likely result in the future should plaintiffs continue to bring federal oil field cases: "Conflicts in the interpretation

of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts." *Id.* at 334. 63 S.Ct. 1098.

Equally importantly, the Court noted that "if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here." *Id.* In other words, the Court found that federal-court review gave rise to tremendous risks and offered no benefits, whereas state-court review gave rise to no risks (because the federal judiciary retained the power to consider federal questions at a later date) and had the benefit of producing correct and consistent interpretations of state law: "As a practical matter, the federal courts can make small contribution to the well organized system of regulation and review which the Texas statutes provide. Texas courts can give fully as great relief, including temporary restraining orders, as the federal courts." *Id.* at 327, 63 S.Ct. 1098.

v. The Question Presented in *Burford*

Fifth, the Court considered the nature of the question of law underlying *Burford*. Although Sun Oil claimed to sue in order to redress a due process violation, it apparently urged the Court to instead consider whether the Commission's decision was "reasonable" under Texas statutory law, a question distinct from that of whether the Commission afforded Sun Oil due process. *Id.* at 331-32, 63 S.Ct. 1098; *see also Quackenbush,* 517 U.S. at 723, 116 S.Ct. 1712 ("The principal issue presented in *Burford* was the

'reasonableness' of an order issued by the Texas Railroad Commission[.]")

In addition, Sun Oil's case "raised a number of [other] problems" of state law that were "of no general significance," including questions of *res judicata* and jurisdiction, regarding which "a federal court can only try to ascertain state law." *Burford,* 319 U.S. at 331, 63 S.Ct. 1098. These state-law questions were so unsettled that abstention under *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) may have been necessary in order to permit the state to issue an "authoritative determination of the difficult state questions." *Burford* at 331, 63 S.Ct. 1098.

b. *Alabama*

Like *Burford, Ala. Pub. Serv. Comm'n v. S. Ry. Co.,* 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951) fits in the second *NOPSI* category, which is the category at issue in the present case. *NOPSI,* 491 U.S. at 361, 362, 109 S.Ct. 2506; *Colo. River,* 424 U.S. at 815, 96 S.Ct. 1236. Southern Railway sued to enjoin members of the Alabama Public Service Commission ("APSC") from enforcing an order that prohibited Southern Railway from abandoning two unprofitable intrastate train routes. *Alabama* at 342, 71 S.Ct. 762. Under Alabama law, the APSC's permission was a prerequisite to such abandonment. *Id.* Southern Railway argued that the APSC's decision violated the right to due process. *Id.* at 343, 71 S.Ct. 762. A three-judge federal trial court agreed. *Id.* at 343-44, 346-47, 71 S.Ct. 762. The Supreme Court reversed, holding that the federal trial

court should have abstained under *Burford. Alabama* at 349-51, 71 S.Ct. 762.

In reaching this conclusion, the Court relied on factors similar to those cited in *Burford:* (1) facts about intrastate rail transportation, (2) Alabama's centralized approach to regulating intrastate rail transportation, (3) Alabama's centralized system for reviewing regulatory decisions, (4) the dangers of federal review of regulatory decisions, and (5) the nature of the question presented in the case.

First, the Court observed that intrastate rail transportation was "primarily the concern of the state," *id.* at 346, 71 S.Ct. 762, and that "the problems raised by the discontinuance of trains Nos. 7 and 8 cannot be resolved alone by reference to appellee's loss in their operation but depend more upon the predominantly local factor of public need for the service rendered," iId. at 347, 71 S.Ct. 762.

Second, the Court relied on the fact Alabama state law required railroad companies to receive permission from the APSC before abandoning intrastate routes. *Id.* at 342, 71 S.Ct. 762. In denying such permission to Southern Railway, the APSC relied on a local, fact-specific inquiry, concluding "that there exist[ed] a public need for the service and that appellee had not attempted to reduce losses through adoption of more economical operating methods." *Id.* at 343, 71 S.Ct. 762.

Third, the Court relied on Alabama's decision to concentrate judicial review of APSC decisions in a single court:

> Not only has Alabama established its Public Service Commission to pass upon a proposed discontinuance of intrastate transportation service, but it has also provided for appeal from any final order of the Commission to the circuit court of Montgomery County as a matter of right. That court, after a hearing on the record certified by the Commission, is empowered to set aside any Commission order found to be contrary to the substantial weight of the evidence or erroneous as a matter of law and its decision may be appealed to the Alabama Supreme Court. Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are supervisory in character.

Id. at 348, 71 S.Ct. 762 (citations and quotation marks omitted). As in *Burford,* the Supreme Court in *Alabama* cited the adequacy of this judicial review, observing that "Appellee has not shown that the Alabama procedure for review of Commission orders is in any way inadequate to preserve for ultimate review in this Court any federal questions arising out of such orders." *Alabama* at 349, 71 S.Ct. 762.

Fourth and fifth, the Court relied on the dangers of federal review and on the nature of the question presented, which was, in effect, a pure question of state law. Most notably, the Court observed with unsuppressed disdain "that a federal court has been asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the

public need for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and the other Alabama communities directly affected." *Id.* at 347-48, 71 S.Ct. 762.[4]

2. Supreme Court Cases Rejecting *Burford* Abstention

In all cases decided after *Alabama* in which the Supreme Court considered *Burford* abstention, it held that such abstention was inappropriate.

i. *Allegheny*

In *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959), the Supreme Court held that a district court may not abstain under *Burford* from exercising diversity jurisdiction-

> [I]n a state eminent domain case in which the exercise of that jurisdiction would not entail the

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[4] The ESDC nevertheless writes that in *Alabama*, the Supreme Court "appl[ied] *Burford* abstention in the absence of any difficult state-law questions." (ESDC's 3/23/07 Br. at 8.) I reject that interpretation. Indeed, the ESDC acknowledges that the Supreme Court found that *Burford* abstention was appropriate in *Alabama*" in deference to local determinations of 'public need' for railroad service in a particular case." (ESDC's 3/23/07 Br. at 18.) More importantly, the Supreme Court itself has explained that in *Alabama*," the success of the railroad's constitutional challenge depended upon the predominantly local factor of public need for the service rendered." *NOPSI*, 491 U.S. at 361, 109 S.Ct. 2506 (*citing Alabama* at 347, 71 S.Ct. 762; quotation marks omitted).

> possibility of a premature and perhaps unnecessary decision of a serious federal constitutional question, would not create the hazard of unsettling some delicate balance in the area of federal-state relationships, and would not even require the District Court to guess at the resolution of uncertain and difficult issues of state law.

Allegheny at 187, 79 S.Ct. 1060. The plaintiffs in *Alabama* sued a local authority that had exercised the power of eminent domain to acquire their property, which it then leased it to a private business. *Id.* The plaintiffs sued under a state law providing that "private property cannot be taken for a private use under the power of eminent domain." *Id.* (citation and quotation marks omitted). The district court dismissed the case under an abstention theory. *Id.* at 188, 79 S.Ct. 1060.

In concluding that *Burford* abstention in particular was unwarranted, the Supreme Court relied on its finding that the only question presented, although a question of state law, was a "purely factual question" ("whether the County expropriated the respondents' land for private rather than for public use," *Allegheny* at 190, 79 S.Ct. 1060; *see also id.* at 196, 79 S.Ct. 1060) based on state law that was "settled," *Id.* at 188, 79 S.Ct. 1060, "clear and certain," *Id.* at 196, 79 S.Ct. 1060. The Court also relied on its finding that a refusal to exercise federal jurisdiction would cause "delay and expense" to all parties, because the plaintiffs would re-file their case in state court, and especially to plaintiffs, because if their suit had merit, they would

suffer "further prolonged unlawful denial of the possession of their property." *Id.* at 196, 79 S.Ct. 1060.

The *Allegheny* Court considered whether *Burford* abstention is more appropriate in eminent-domain cases than in other cases involving state or local issues. It concluded that it is not:

> [E]minent domain is no more mystically involved with "sovereign prerogative" than a State's power to regulate fishing in its waters, its power to regulate intrastate trucking rates, a city's power to issue certain bonds without a referendum, its power to license motor vehicles, and a host of other governmental activities carried on by the States and their subdivisions which have been brought into question in the Federal District Courts despite suggestions that those courts should have stayed their hand pending prior state court determination of state law.

Allegheny at 192, 79 S.Ct. 1060 (citations to cases omitted). The Court made three observations in support of the quoted statement. First, it observed that "the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations." *Id.* Second, the Court observed that it had repeatedly approved of "Federal District Courts [ ] decid[ing] state condemnation proceedings in proper cases despite challenges to the power of the condemning authority to take the property." *Id.* at 194, 79 S.Ct. 1060. Third, the Court observed that Fed. R. Civ. P. 71A(k), which has

not changed since *Allegheny* was decided, "makes perfectly clear . . . that this Court . . . intended that state eminent domain cases, including those which raised questions of authority to take land, would be tried in the Federal District Courts if jurisdiction was properly invoked." *Id.* at 195, 79 S.Ct. 1060 (footnote omitted).[5] "Rule 71A was adopted only after a thorough investigation of eminent domain practice in the federal courts, and its provision for trying state eminent domain cases in the District Courts necessarily reflects a conclusion that this practice is unobjectionable." *Id.* at 195-96, 79 S.Ct. 1060.

ii. *McNeese*

In *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187,* 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963), African-American public-school students sued under federal law to desegregate their school. *McNeese* at 669, 83 S.Ct. 1433. The district court dismissed the case because it found that the students had not exhausted administrative remedies available under state law. *Id.* at 670, 83 S.Ct. 1433. The Seventh Circuit affirmed, *Id.*, and the Supreme Court reversed, *Id.* at 676, 83 S.Ct. 1433.

In reversing, the Supreme Court considered whether *Burford* abstention was appropriate. It found that for two reasons, it was not. First, it found that the

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[5] Rule 71A(k) provides in relevant part that the practice described elsewhere in Rule 71A for actions regarding the condemnation of property "governs in actions involving the exercise of the power of eminent domain under the law of a state[.]"

question presented was a question of purely federal law, which was "plainly federal in origin and nature" and was not "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *Id.* at 674, 83 S.Ct. 1433. The federal district court therefore had no reason to consider "whether respondents' conduct is legal or illegal as a matter of state law." *Id.* Second, the Court found that "it is by no means clear that Illinois law provides petitioners with an administrative remedy sufficiently adequate to preclude prior resort to a federal court for protection of their federal rights." *Id.* at 674-75, 83 S.Ct. 1433.

iii. *Colorado River*

In *Colo. River Water Conser. Dist. v. U.S.*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), the United States sought a declaration that it and several Indian tribes, rather than defendant water users, owned the right to water in certain rivers under Colorado law. *Colo. River* at 804-806, 96 S.Ct. 1236. The United States sued in federal district court, relying for jurisdiction on 28 U.S.C. § 1345, which provided, "Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress." *Colo. River* at 805, 96 S.Ct. 1236. The district court dismissed the case under a general theory of abstention, although it apparently did not cite *Burford* in its oral decision. *Id.* at 806, 96 S.Ct. 1236; *see also U.S. v. Akin,* 504 F.2d 115, 117 (10th Cir. 1974). The Tenth Circuit reversed. *Colo. River* at 806, 96 S.Ct. 1236; *Akin.*

Although the Supreme Court held that dismissal was proper, it rejected the application of *Burford* abstention, and in particular the second category identified in *NOPSI,* which is the category at issue in the present case. *Colo. River* at 814-16, 96 S.Ct. 1236. The Court offered two reasons for rejecting *Burford.* The first was that, as in *Allegheny,* "[w]hile state claims are involved in the case, the state law to be applied appears to be settled." *Colo. River* at 815, 96 S.Ct. 1236. The second reason was that *Colo. River* presented "[n]o questions bearing on state policy." *Id.* In other words, "decision of the state claims [would not] impair efforts to implement state policy as in *Burford.*" *Id.* The Court elaborated:

> To be sure, the federal claims that are involved in the case go to the establishment of water rights which may conflict with similar rights based on state law. But the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction. The potential conflict here, involving state claims and federal claims, would not be such as to impair impermissibly the State's effort to effect its policy respecting the allocation of state waters. Nor would exercise of federal jurisdiction here interrupt any such efforts by restraining the exercise of authority vested in state officers.

Id. at 815-16, 96 S.Ct. 1236 (citations omitted).

iv. *NOPSI*

In *NOPSI,* 491 U.S. 350, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989), the plaintiff, a power company, sued the New Orleans City Council ("Council") based on the Council's decision to deny an immediate rate increase that the plaintiff sought in order to recover its share of the cost of building a nuclear power plant.[6] *NOPSI* at 353-55, 109 S.Ct. 2506. The district court dismissed the case, relying at least in part on *Burford,* and the Fifth Circuit affirmed. *NOPSI* at 358, 109 S.Ct. 2506.

The Supreme Court reversed because it found that the case "d[id] not involve a state-law claim, nor even an assertion that the federal claims are 'in any way entangled in a skein of state-law that must be untangled before the federal case can proceed.'" *Id.* at 361, 109 S.Ct. 2506 (quoting *McNeese,* 373 U.S. at 674, 83 S.Ct. 1433). In doing so, it noted that "[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." *NOPSI* at 362, 109 S.Ct. 2506 (*quoting Colo. River,* 424 U.S. at 815-16, 96 S.Ct. 1236). It then applied this observation to the case at hand:

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[6] NOPSI was obligated to pay a share of that cost pursuant to an order of the Federal Energy Regulatory Commission. *NOPSI* at 354, 109 S.Ct. 2506.

> Here, NOPSI's primary claim is that the Council is prohibited by federal law from refusing to provide reimbursement for FERC-allocated wholesale costs. Unlike a claim that a state agency has misapplied its lawful authority or has failed to take into consideration or properly weigh relevant state-law factors, federal adjudication of this sort of pre-emption claim would not disrupt the State's attempt to ensure uniformity in the treatment of an "essentially local problem[.]"
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> [N]o inquiry beyond the four corners of the Council's retail rate order is needed to determine whether it is facially pre-empted by FERC's allocative decree and relevant provisions of the Federal Power Act. Such an inquiry would not unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity. It may, of course, result in an injunction against enforcement of the rate order, but "there is . . . no doctrine requiring abstention merely because resolution of a federal question may result in the overturning of a state policy."

NOPSI at 362-63, 109 S.Ct. 2506 (*quoting Ala.*, 341 U.S. at 347, 71 S.Ct. 762 and *Zablocki v. Redhail*, 434 U.S. 374, 380 n. 5, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), respectively).

The Court noted that NOPSI had argued, "as an alternative to its facial pre-emption challenge," that

the Council's decision was a pretext for the Council's determination that NOPSI had been unwise in investing in the nuclear plant. *Id.* at 363, 109 S.Ct. 2506. The Court conceded that "[u]nlike the facial challenge, this claim cannot be resolved on the face of the rate order, because it hinges largely on the plausibility of the Council's finding that NOPSI should have, and could have, diversified its supply portfolio and thereby lowered its average wholesale costs," and that "[a]nalysis of this pretext claim requires an inquiry into industry practice, wholesale rates, and power availability during the relevant time period, an endeavor that demands some level of industry-specific expertise." *Id.* It nevertheless found *Burford* abstention inappropriate, reasoning that because "wholesale electricity is not bought and sold within a predominantly local market, [such an inquiry] does *not* demand significant familiarity with, and will not disrupt state resolution of, distinctively local regulatory facts or policies. The principles underlying *Burford* are therefore not implicated." *Id.* at 363-64, 109 S.Ct. 2506 (emphasis in original).

v. *Quackenbush*

In *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996), the California Insurance Commissioner sued Allstate in state court for allegedly breaching a contract with a defunct insurer called Mission. *Quackenbush* at 709, 116 S.Ct. 1712. Allstate removed the case to federal district court and moved the district court to compel arbitration. *Id.* The district court abstained under *Burford* and remanded the case to state court because Allstate's setoff claims raised "a hotly disputed

question of state law" that was the subject of a pending state case. *Quackenbush* at 709-10, 116 S.Ct. 1712. The district court did not address the motion to compel arbitration. *Id.* at 710, 116 S.Ct. 1712.

The Ninth Circuit reversed and ordered the case to arbitration, reasoning that a district court may abstain under *Burford* only when the relief sought is equitable. *Quackenbush* at 710, 729-30, 116 S.Ct. 1712. The Supreme Court affirmed, but rejected the Ninth Circuit's holding, which seemed to establish a *per se* prohibition on *Burford* abstention in non-equity cases. The Supreme Court instead held that "federal courts have the power to dismiss or remand cases based on abstention principles only where the relief being sought is equitable *or otherwise discretionary*. Because this was a damages action, we conclude that the District Court's remand order was an unwarranted application of the *Burford* doctrine." *Quackenbush* at 731, 116 S.Ct. 1712 (emphasis added). The Court therefore found it unnecessary "to inquire fully as to whether this case presents the sort of 'exceptional circumstance' in which Burford abstention or other grounds for yielding federal jurisdiction might be appropriate." *Id.*

It nevertheless explained that *Burford* abstention was inappropriate "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the independence of state action." *Quackenbush* at 728, 116 S.Ct. 1712 (citation and quotation marks omitted). The Court found that the federal interest in the case – the "federal concern for the enforcement of arbitration agreements" – was "pronounced," "substantial," and

"emphatic." *Id.* at 728-29, 116 S.Ct. 1712.It then found that this federal interest outweighed the state interest, noting that "the case appears at first blush to present nothing more than a run-of-the-mill contract dispute." *Id.* at 729, 116 S.Ct. 1712. The Court recognized that federal litigation might have an "impact" on Mission's ongoing state-court liquidation proceeding, but found that the state-law issue, which was "hotly contested" when the district court decided to abstain, had since been resolved by the California Supreme Court. *Id.*[7]

3. Application of *Burford* to the Present Case

Defendants argue that this case belongs in the second category identified in *NOPSI* and that this court must abstain pursuant to *Burford.* The court must therefore abstain if (1) "timely and adequate state-court review is available" and (2) the "exercise of federal review of the question in [this] case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern." *NOPSI,* 491 U.S. at 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) (quotation

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[7] I find no need to discuss at length the facts of *Ankenbrandt v. Richards,* 504 U.S. 689, 112 S.Ct. 2206, 119 L.Ed.2d 468 (1992). In that case, the Supreme Court stated, in *dicta,* that *Burford* abstention may be appropriate "in a case involving elements of a domestic relationship" if the case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Ankenbrandt* at 705-06, 112 S.Ct. 2206 (*quoting Colo. River,* 424 U.S. at 814, 96 S.Ct. 1236). Such a case would fall in the first *NOPSI* category, which is not at issue in the present case.

marks and citation omitted). I will consider each element in turn.

In considering the second element, I will be guided by the Second Circuit's identification of four relevant factors: (1) "the degree of specificity of the state regulatory scheme," (2) "the necessity of discretionary interpretation of state statutes," (3) "whether the subject matter of the litigation is traditionally one of state concern," and (4) whether the state "ha[s] created a centralized system of judicial review of commission orders, which permit[s] the state courts, like the Railroad Commission itself [in *Burford*], to acquire a specialized knowledge of the regulations and industry." *Bethphage Lutheran Serv., Inc. v. Weicker,* 965 F.2d 1239, 1243, 1245 (2d Cir. 1992) (citations and quotation marks omitted).[8]

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[8] Judge Levy considered only the first three of these factors and erroneously presumed that "a finding that the case at bar implicates the first and either of the second or third factors weighs in favor of" abstention. (Report and Recommendation (Docket No. 83) at 35.) In so presuming, Judge Levy appears to have misapplied an earlier opinion of his in which he correctly held that when the first and either the second or third *NOPSI* (not *Bethphage*) factors are satisfied–*i.e.,* when timely and adequate state-court review is available and either difficult questions of state law are presented or federal review would disrupt a coherent state policy, *NOPSI,* 491 U.S. at 361, 109 S.Ct. 2506–then a court must abstain. (*Id.* (citing *Feiwus v. Genpar, Inc.,* 43 F. Supp. 2d 289, 294-95 (E.D.N.Y. 1999) (Report and Recommendation) (Levy, M.J.)).) This court rejects the proposition that it must abstain if the first and either the second or third *Bethphage* factors favor abstention.

I will also, however, follow the Second Circuit's instruction that "[e]very abstention case is to be decided upon its particular facts and not with recourse to some mechanical checklist." *Id.* at 1245 (citation and quotation marks omitted). "Ultimately," looking beyond the applicable elements, factors, and instructions, this court will abstain if and only if it finds "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute and the competing concern for the 'independence of state action,' that the State's interests are paramount and that a dispute would best be adjudicated in a state forum." *Quackenbush,* 517 U.S. at 728, 116 S.Ct. 1712 (*quoting Burford,* 319 U.S. at 334, 63 S.Ct. 1098 and citing *NOPSI,* 491 U.S. at 363, 109 S.Ct. 2506). "[T]he power to dismiss recognized in *Burford* represents an 'extraordinary and narrow exception to the duty of the District Court to adjudicate a controversy properly before it.'" *Quackenbush* at 728, 116 S.Ct. 1712 (quoting *Colo. River,* 424 U.S. at 813, 96 S.Ct. 1236 (quoting *Allegheny,* 360 U.S. at 188, 79 S.Ct. 1060)).

a. Timely and Adequate State-Court Review

The Second Circuit has held that EDPL § 207 affords condemnees due process. *Brody v. Village of Port Chester,* 434 F.3d 121, 132-36 (2d Cir. 2005). The question of whether a procedure that affords due process is inherently "adequate" for the purpose of *Burford* analysis is an intriguing one, and may prove critical to deciding certain cases. This is not such a case. For the purpose of resolving the present motion, I assume that Section 207 provides timely and adequate state-court review.

b. Disruption of State Efforts to Establish a Coherent Policy with Respect to a Matter of Substantial Public Concern

I will address this element using the four-factor framework adopted by the Second Circuit in *Bethphage*. I find that each of those factors supports hearing this case rather than abstaining.

i. Specificity

The first factor is "the degree of specificity of the state regulatory scheme." *Bethphage*, 965 F.2d at 1243. This factor favors abstention if "state law provides a comprehensive statutory framework to formulate policy and decide cases, including opportunities for state court review." *Id.*

The EDPL is not "specific" in the sense relevant to *Burford* abstention because it does not set forth the criteria by which a condemnor is to determine whether some public project is desirable, nor even criteria by which to determine whether a project justifies the taking of some particular piece of private property rather than another. The EDPL therefore does not provide a framework for formulating policy or deciding cases. Instead, the EDPL applies only after the decision to take private property has already been made. The very first instruction in the EDPL makes this clear:

> [T]he condemnor, in order to inform the public and to review the public use to be served by a proposed public project and the impact on the

> environment and residents of the locality where such project will be constructed, shall conduct a public hearing in accordance with the provisions of this article at a location reasonably proximate to the property which may be acquired for such project.

EDPL § 201. This instruction assumes that the condemnor has already conceived of a public project and determined what property should be taken in order to effectuate the project. While those decisions depend on the sort of specific, local, fact-intensive inquiries from which a federal court perhaps ought to abstain, considering whether a particular taking is constitutional-as opposed to considering whether it is a good idea-does not.

This case is therefore different from *Burford* and *Alabama*. In *Burford*, a federal court was asked to consider whether the Commission's decision to award drilling rights to one party was "reasonable" under Texas statutory law, a standard that differed from federal constitutional standards more familiar to the court. *Burford*, 319 U.S. at 331-32, 63 S.Ct. 1098; *see also Quackenbush*, 517 U.S. at 723, 116 S.Ct. 1712. The Commission made its decisions by accepting overall production quotas for the entire State and determining from those quotas the amount of oil each field and each well would produce. *Burford* at 320, 320 n. 12, 63 S.Ct. 1098. The Commission was also charged with restraining waste, which resulted both from excessive production and, because of dissipation, from any delay in production. *Id.* at 322, 63 S.Ct. 1098. It is easy to understand why the Supreme Court held that

federal courts ought to abstain from considering such local and specific factors.

Similarly, in *Alabama* "a federal court [was] asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and the other Alabama communities directly affected." *Alabama,* 341 U.S. at 347-48, 71 S.Ct. 762; *see also NOPSI,* 491 U.S. at 361, 109 S.Ct. 2506 (observing that in *Alabama,*" the success of the railroad's constitutional challenge depended upon the predominantly local factor of public need for the service rendered"). Again, it is easy to understand why the Supreme Court held that federal courts should abstain from making decisions based on these local concerns. No such concerns are placed before this court by the present case.

The City Defendants argue that permitting this federal litigation to proceed would thwart "the State's policy," embodied in the EDPL, "to promote efficiency and reduce litigation." (City Defs.' 3/23/07 Br. (Docket No. 92) at 5.) The court rejects that argument. This court must abstain only if "exercis[ing] of federal review of the question in [this] case and in similar cases would be disruptive of state efforts to establish a *coherent* policy with respect to a matter of substantial public concern." *NOPSI,* 491 U.S. at 361, 109 S.Ct. 2506 (emphasis added). My concern, therefore, is with the EDPL's coherence, not with any of its other virtues, such as reducing litigation and promoting efficiency. In considering whether the Project constitutes a "public use" under the United States

Constitution, this court will not disrupt the coherence of the EDPL, a generic statutory scheme designed to deal with takings of all kinds and for a virtually infinite variety of public purposes.

The ESDC argues that "[i]f federal court adjudication [of cases such as this one] were to become a common occurrence . . . the State's effort's to ensure uniformity of treatment, avoid delay, and protect against piecemeal adjudication would be eviscerated[.]" (ESDC's 3/23/07 Br. (Docket No. 95) at 3.) That argument is also rejected. The State's interest in "uniformity of treatment" under the United States Constitution surely cannot trump the United States' interest in such uniformity. The State's interest in avoiding delay is not relevant to *Burford* analysis because it is not a function of the EDPL's coherence. The court is not aware of any danger of "piecemeal adjudication" that may result if the court hears this case.

Defendants seem to conflate (1) the political process of selecting public projects and sites for condemnation and (2) the legal process of determining whether a particular project serves a "public use" under the United States Constitution. The political process is certainly one of great local interest and no or minimal federal interest, just like the "reasonableness" issue in *Burford* and the "public need" issue in *Alabama*. But this court is not being asked to evaluate the political questions underlying the Project. This case simply does not require the court to consider whether the Project is a good idea or whether it can be achieved only by taking Plaintiffs' properties as opposed to other properties or no private properties at all. Instead, the

issue before this court is whether the taking of Plaintiffs' properties is rationally related to a conceivable public use, as required by the United States Constitution. *Midkiff*, 467 U.S. at 241, 104 S.Ct. 2321. This is a question of federal law, not local policy, and I am obligated to address it.

ii. Discretionary Interpretation of State Law

The second factor I must consider is "the necessity of discretionary interpretation of state statutes." *Bethphage*, 965 F.2d at 1243.

This factor was critical to the Supreme Court's decision to approve of abstention in *Burford* and *Alabama*. The primary question presented in *Burford* was whether the Commission's decision was "reasonable" under Texas statutory law. *Burford*, 319 U.S. at 331-32, 63 S.Ct. 1098; *see also Quackenbush*, 517 U.S. at 723, 116 S.Ct. 1712. In addition, *Burford*" raised a number of [other] problems" of state law that were "of no general significance," including questions of *res judicata* and jurisdiction, "on which a federal court can only try to ascertain state law." *Burford* at 331, 63 S.Ct. 1098. The Supreme Court observed that these state-law questions were so unsettled that abstention under *R.R. Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941) may have been necessary in order to permit the state to issue an "authoritative determination of the difficult state questions." *Burford* at 331, 63 S.Ct. 1098. At the same time, "[t]he constitutional challenge [in *Burford*] was of minimal federal importance, involving solely the question whether the commission had properly applied

Texas' complex oil and gas conservation regulations." *NOPSI,* 491 U.S. at 360, 109 S.Ct. 2506 (*citing Burford* at 331 & n. 28, 63 S.Ct. 1098).

Similarly, in *Alabama*" a federal court [was] asked to intervene in resolving the essentially local problem of balancing the loss to the railroad from continued operation of trains Nos. 7 and 8 with the public need for that service in Tuscumbia, Decatur, Huntsville, Scottsboro, and the other Alabama communities directly affected." *Alabama,* 341 U.S. at 347-48, 71 S.Ct. 762; *see also NOPSI* at 361, 109 S.Ct. 2506.

In this case, in contrast to *Burford* and *Alabama,* the questions of state law are straightforward and largely duplicative of the questions of federal law that this court must address. I note first that it is questions of federal law that predominate, as three of Plaintiffs' four claims are based on allegations that their federal constitutional rights have been violated. The three claims do not rely in any way on state law. Therefore, however much discretionary interpretation of state law this case may require– and I find that it requires none – the need to interpret state law is dwarfed by the need to interpret the United States Constitution.

Plaintiffs' fourth claim is brought pursuant to EDPL § 207. A court considering a Section 207 challenge to a taking must consider four issues. The first is whether "the proceeding [underlying the taking] was in conformity with the federal and state constitutions." EDPL § 207(C)(1). Because the reviewing court, whether federal or state, must interpret the constitution with which the other has greater experience, federal and state courts are equally

competent to resolve this issue. Furthermore, it appears that the takings provisions of the federal and state constitutions are coterminous, as both constitutions require the court to consider whether a taking is rationally related to a conceivable public purpose. *See Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984) (United States Constitution); *West 41st St. Realty LLC v. New York State Urban Dev. Corp.*, 298 A.D.2d 1, 744 N.Y.S.2d 121, 125 (1st Dep't 2002) (New York Constitution).[9]

The second Section 207 issue is whether "the proposed acquisition is within the condemnor's statutory jurisdiction or authority." EDPL § 207(C)(2). Plaintiffs' Section 207 challenge does not incorporate any allegations relevant to this issue. (*See* Am. Compl. ¶¶ 171-80.)

The third Section 207 issue is whether "the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law." EDPL § 207(C)(3). The only allegation relevant to this issue is that "ESDC violated section 204(a) of the EDPL by failing to make its determination and findings within 90 days of the stated close of the public

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[9] That abstention is unwarranted is supported by the fact that no state constitutional issue seems to be at play in this case. Plaintiffs' Section 207(C)(1) claim is that "[t]he Determination and Findings do not conform, and result from proceedings that did not conform, with the United States Constitution." (Am. Compl. ¶ 176.) That claim does not refer to the New York Constitution.

hearing on August 23, 2006." (Am. Compl. ¶ 178.) This court is competent to consider that allegation, which does not require the court to engage in discretionary interpretation of any state law.

The fourth and final Section 207 issue is whether "a public use, benefit or purpose will be served by the proposed acquisition." EDPL § 207(C)(4). This court need not engage in discretionary interpretation of any state statute in order to ascertain the meaning of the phrase "public use." In order to find a public use, this court must merely find "an evident utility on the part of the public." *West 41st St. Realty,* 744 N.Y.S.2d at 125. As long as the public use is "dominant" in relation to whatever private benefits may exist, the taking serves a public use. *Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency,* 301 A.D.2d 292, 750 N.Y.S.2d 212, 221 (4th Dep't 2002); *Bergen Swamp Pres. Soc'y v. Village of Bergen,* 294 A.D.2d 827, 741 N.Y.S.2d 363, 364 (4th Dep't 2002). This court is competent to apply those settled rules, and there is no danger that in doing so it will become "in any way entangled in a skein of state law that must be untangled before the federal case can proceed." *McNeese,* 373 U.S. at 674, 83 S.Ct. 1433.

iii. Subject Matter of the Litigation

The third factor the Second Circuit has identified as relevant to *Burford* analysis is "whether the subject matter of the litigation is traditionally one of state concern." *Bethphage,* 965 F.2d at 1243. Eminent domain is traditionally a matter of both state and federal concern. While the impact of a particular public project and associated taking is felt locally, the right

not to have one's property taken other than to serve a public use is enshrined in the United States Constitution. In addition, "the presence of a federal basis for jurisdiction," which exists in this case because three of Plaintiffs' claims allege violations of federal constitutional rights, "may raise the level of justification needed for abstention." *Colo. River,* 424 U.S. at 815 n. 21, 96 S.Ct. 1236; *see also County of Suffolk v. Long Island Lighting Co.,* 907 F.2d 1295, 1308 (2d Cir. 1990).

In *Allegheny,* the Supreme Court observed that the issue of eminent domain has long been a concern of federal courts. The Court relied in part on this historical observation in concluding that *Burford* abstention was not appropriate in the eminent-domain case before it, noting that eminent domain is not "mystically involved with [a state's] 'sovereign prerogative'" and that "the federal courts have been adjudicating cases involving issues of state eminent domain law for many years, without any suggestion that there was entailed a hazard of friction in federal-state relations." *Allegheny,* 360 U.S. at 192, 79 S.Ct. 1060.

This court therefore rejects Defendants' argument that the federal judiciary should allow state courts to develop law established in the United States Constitution. Justice O'Connor put it best when she wrote that deferring to state courts to develop the law of takings would be "an abdication of our responsibility. States play many important functions in our system of dual sovereignty, but compensating for our refusal to enforce properly the Federal Constitution (and a provision meant to curtail state

action, no less) is not among them." *Kelo v. City of New London,* 545 U.S. 469, 504, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005) (O'Connor, J., dissenting) (citation omitted).

iv. Judicial Review

The fourth factor I must consider is whether the state "ha[s] created a centralized system of judicial review of commission orders, which permit[s] the state courts, like the Railroad Commission itself [in *Burford*], to acquire a specialized knowledge of the regulations and industry." *Bethphage,* 965 F.2d at 1245. As the Supreme Court observed in *NOPSI,* this element was critical to the decisions to abstain in *Burford* and *Alabama. NOPSI* at 360-61, 109 S.Ct. 2506. A brief look at those cases demonstrates that they are materially different from the case now before this court.

In *Burford,* judicial review was concentrated in a single court located in Travis County. *Burford,* 319 U.S. at 325, 63 S.Ct. 1098. Such concentration served the purposes of (1) avoiding inconsistent decisions on appeal from Commission orders, which would lead to "intolerable confusion" and, potentially, wasted oil and tax revenue, and (2) allowing the court that reviewed Commission decisions "to acquire a specialized knowledge which is useful in shaping the policy of regulation of the ever-changing demands in this field." *Id.* at 325, 327, 63 S.Ct. 1098. The Travis County court acted as a "working partner" with the Commission and had some arguably "legislative powers." *Id.* at 325-27, 63 S.Ct. 1098. In addition, its review of the Commission's decisions was "expeditious and adequate." *Id.* at 334, 63 S.Ct. 1098.

In *Alabama,* the Supreme Court found that the "right of statutory appeal concentrated in one circuit court which exercised supervisory powers was . . . an integral part of the regulatory process under the Alabama Code." *NOPSI* at 361, 109 S.Ct. 2506 (*citing Alabama,* 341 U.S. at 348, 71 S.Ct. 762) (quotation marks omitted). As in *Burford,* the Court characterized this judicial review as adequate. *Alabama,* 341 U.S. at 349, 71 S.Ct. 762.

In this case, by contrast, judicial review is concentrated in the entire Appellate Division, which consists of four Departments located in different parts of the state. It is therefore unlikely that any particular judge or Department will develop the sort of expertise regarding eminent domain cases that Travis County judges developed regarding oil-drilling or Montgomery County judges developed regarding the public need for rail service.

If the New York legislature had wanted to foster such expertise, it could have done so. Indeed, it has done so in other areas of law. For example, whereas appeals of most administrative decisions may be brought "in any county within the judicial district where the proceeding is triable," N.Y. C.P.L.R. § 506(a), the following appeals may be brought only in the trial court located in Albany County:

> [A] proceeding against the regents of the university of the state of New York, the commissioner of education, the commissioner of taxation and finance, the tax appeals tribunal except as provided in section two thousand sixteen of the tax law, the public service

> commission, the commissioner or the department of transportation relating to articles three, four, five, six, seven, eight, nine or ten of the transportation law or to the railroad law, the water resources board, the comptroller or the department of agriculture and markets[.]

N.Y. C.P.L.R. § 506(b)(2). Had the New York legislature wished to endow a court with expertise regarding eminent domain cases, it could have similarly provided that Section 207 proceedings may be brought in only one particular county or Department of the Appellate Division.

But there is no need for such expertise. The questions presented by a Section 207 claim are straightforward and do not require the sort of technical knowledge that may be helpful when determining whether a decision to grant oil-drilling rights was reasonable, *Burford,* or whether there is a public need for a particular rail route, *Alabama.* The EDPL provides for review in the four Appellate Division departments rather than in New York's trial courts not to promote expertise, but rather for the sake of expedience.

Furthermore, nearly all cases that are commenced in New York trial courts are appealable to the Appellate Division. N.Y. C.P.L.R. § 5701(a)(1) ("An appeal may be taken to the appellate division as of right in an action, originating in the supreme court or a county court from any final or interlocutory judgment except one entered subsequent to an order of the appellate division which disposes of all the issues in the action"). To say that the Appellate Division has

developed "expertise" with regard to all types of cases would be to rob the word "expertise" of the specific meaning it has in the context of *Burford* abstention.

* * *

The Supreme Court has explained that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River,* 424 U.S. at 813, 96 S.Ct. 1236. This is because federal district courts are obligated to hear cases within their jurisdiction; indeed, that is the very reason they exist:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest. It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it.

Id. at 813-814, 96 S.Ct. 1236. In *Burford,* the Supreme Court "approved the District Court's dismissal of the complaint on a number of grounds that were unique to that case." *Quackenbush,* 517 U.S. at 725, 116 S.Ct. 1712. This case does not present similar exceptional circumstances that compel me to abdicate my

obligation to exercise this court's jurisdiction. I therefore decline to abstain.

B. Ripeness and *Younger* Abstention

Defendants argue that this case must be dismissed as unripe and that this court must abstain under the doctrine set forth in *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Judge Levy recommended that I decline to dismiss this case on either of those two grounds. I have considered both of those grounds *de novo.* I accept and adopt Judge Levy's reasoning and recommendation as to both of those grounds.

C. Public Use Analysis

Defendants also move to dismiss on the theory that Plaintiffs have failed to state a claim for a violation of the Takings Clause of the Fifth Amendment to the United States Constitution, which provides that "private property [shall not] be taken for public use, without just compensation." The Takings Clause imposes two requirements on the exercise of eminent domain to take private property: "the taking must be for a 'public use' and 'just compensation' must be paid to the owner." *Brown v. Legal Found. of Wash.,* 538 U.S. 216, 231-232, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003); *Brody v. Village of Port Chester,* 434 F.3d 121, 127 (2d Cir. 2005). The public use requirement, which is the requirement at issue in this case, applies to the states via the Fourteenth Amendment. *Kelo v. City of New London,* 545 U.S. 469, 472 n. 1, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005); *Brody* at 127.

I find that Plaintiffs have not sufficiently alleged that the takings at issue violate the public use requirement. I therefore must dismiss this case. My discussion begins with the three Supreme Court cases that define the boundaries of the public use requirement: *Berman v. Parker,* 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), *Hawaii Hous. Auth. v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), and *Kelo.*

1. ***Berman v. Parker***

In *Berman,* the Supreme Court considered Congress's decision to condemn private property in Washington, D.C. in order to alleviate conditions found to be "injurious to the public health, safety, morals, and welfare." *Berman* at 28, 75 S.Ct. 98. Congress passed a statute that authorized the District of Columbia Land Agency to lease or sell portions of the condemned property "to a redevelopment company, individual, or partnership." *Id.* at 30, 75 S.Ct. 98. The owners of a department store sued to enjoin the taking of their property, arguing that their property "is commercial, not residential property; it is not slum housing; it will be put into the project under the management of a private, not a public, agency and redeveloped for private, not public, use." *Id.* at 31, 75 S.Ct. 98.

The Supreme Court found constitutional both the statute and its application to the plaintiffs even though the plaintiffs' property was not blighted and was likely to be transferred to a private entity. The Court first observed that the statute was enacted pursuant to Congress's police power over Washington, D.C., and

then stated that "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one." *Id.* at 31-32, 75 S.Ct. 98. The Court found that in enacting the statute at issue, Congress had acted for a public purpose-the creation of a "better balanced, more attractive community," *Id.* at 31, 75 S.Ct. 98-that qualified as a "public use" under the Takings Clause. *Id.* at 32-33, 75 S.Ct. 98.

The Court rejected the plaintiffs' argument "that since their building does not imperil health or safety nor contribute to the making of a slum or a blighted area, it cannot be swept into a redevelopment plan by the mere dictum of the Planning Commission or the Commissioners." *Id.* at 34, 75 S.Ct. 98. Instead, the Court deferred to the decision of "Congress and its authorized agencies [to] attack the problem of the blighted parts of the community on an area rather than on a structure-by-structure basis" in order to best prevent the area from reverting to slum or blighted conditions. *Id.* The Court concluded, "Property may of course be taken for this redevelopment which, standing by itself, is innocuous and unoffending." *Id.* at 35, 75 S.Ct. 98.

Having found that taking plaintiffs' property served a public use, the Court announced that it would not evaluate the means chosen to effectuate that use:

> Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end. . . . Here one of the means chosen is the

> use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established.
>
> * * *
>
> Once the question of the public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch.

Id. at 33, 35-36, 75 S.Ct. 98 (citations omitted).

2. *Hawaii Housing Authority v. Midkiff*

In *Midkiff,* the Supreme Court considered whether the public use requirement "prohibits the State of Hawaii from taking, with just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simple in the State." *Midkiff,* 467 U.S. at 231-32, 104 S.Ct. 2321. The Court found that such a taking served a public use and was therefore constitutional.

The Hawaii legislature found that forty-seven percent of the state's land was owned by seventy-two private landowners. *Id.* at 232, 104 S.Ct. 2321. The legislature "concluded that concentrated land ownership was responsible for skewing the State's residential fee simple market, inflating land prices,

and injuring the public tranquility and welfare." *Id.* In order to solve those problems, the legislature enacted a statute that authorized a state agency to condemn residential tracts and transfer fees simple from landowners to lessees. *Id.* at 233-34, 104 S.Ct. 2321.

The landowners sued, arguing that the statute was unconstitutional because it transferred property from one private party to another and therefore did not perform a public use. The district court disagreed, reasoning that "the [statute's] goals were within the bounds of the State's police powers and [ ] the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith." *Id.* at 235, 104 S.Ct. 2321. The Ninth Circuit reversed, concluding that the statute "was simply a naked attempt on the part of the state of Hawaii to take the private property of A and transfer it to B solely for B's private use and benefit." *Id.* (citation and quotation marks omitted).

The Supreme Court found the statute constitutional. Its starting point was *Berman,* which it read as holding in part that "[t]he 'public use' requirement is [ ] coterminous with the scope of a sovereign's police powers." *Midkiff* at 240, 104 S.Ct. 2321. In affirming this holding, the Court explicitly rejected the Ninth Circuit's reading of *Berman* as "requiring that [the] government possess and use property at some point during a taking" in order for the taking to have a public use. *Id.* at 243, 104 S.Ct. 2321.

The Court then affirmed that, as it held in *Berman,* the judiciary's role in reviewing a legislature's

judgment as to what constitutes a public use is "extremely narrow." *Midkiff* at 240, 104 S.Ct. 2321 (citing *Berman* at 32, 75 S.Ct. 98). More specifically, the Court held that the judiciary "will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation." *Midkiff* at 241, 104 S.Ct. 2321 (citation and quotation marks omitted); *see also Id.* at 244, 104 S.Ct. 2321 ("[I]f a legislature, state or federal, determines there are substantial reasons for an exercise of the taking power, courts must defer to its determination that the taking will serve a public use.").

The Court rejected the argument that because the properties at issue were being transferred to private parties, the takings were unconstitutional:

> To be sure, the [Supreme] Court's cases have repeatedly stated that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid. . . . But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause.

Id. at 241, 104 S.Ct. 2321 (citations and quotation marks omitted). In other words, "[t]he mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. . . . [I]t is only the taking's purpose, and not

its mechanics, that must pass scrutiny under the Public Use Clause." *Id.* at 243-44, 104 S.Ct. 2321. On the other hand, the Court explained, a "purely private" taking, *i.e.*, a taking "executed for no reason other than to confer a private benefit on a particular private party," would be unconstitutional because "it would serve no legitimate purpose of government." *Id.* at 245, 104 S.Ct. 2321. The Court found that "no purely private taking [wa]s involved" in the case before it. *Id.*

The Court then considered the Hawaii statute's purpose and the means chosen to achieve that purpose, employing the following standard: "When the legislature's purpose is legitimate and its means are not irrational, [Supreme Court] cases make clear that empirical debates over the wisdom of takings-no less than debates over the wisdom of other kinds of socioeconomic legislation-are not to be carried out in the federal courts." *Id.* at 242-43, 104 S.Ct. 2321. Regarding the statute's purpose, the Court found that "[r]egulating oligopoly and the evils associated with it is a classic exercise of a State's police powers" that qualifies as a public use. *Id.* at 242, 104 S.Ct. 2321. The Court then found that the legislature's means of regulating oligopoly constituted "a comprehensive and rational approach to identifying and correcting market failure." *Id.* Because its purpose was legitimate and its means rational, "the Hawaii statute must pass the scrutiny of the Public Use Clause." *Id.* at 243, 104 S.Ct. 2321.

3. *Kelo v. City of New London*

In *Kelo,* the Supreme Court considered "whether a city's decision to take property for the purpose of economic development satisfies the 'public use' requirement of the Fifth Amendment." *Kelo,* 545 U.S. at 477, 125 S.Ct. 2655. A five-justice majority answered in the affirmative.

The State of Connecticut sought to revitalize the City of New London, which had suffered "decades of economic decline," and in particular its troubled Fort Trumbull neighborhood. *Id.* at 473, 125 S.Ct. 2655. Shortly after Connecticut authorized bond issues to fund this revitalization and delegated certain planning functions to the New London Development Corporation ("NLDC"), the pharmaceutical company Pfizer announced plans to build a $300 million research facility adjacent to Fort Trumbull. *Id.*

The NLDC then announced a development plan that capitalized on Pfizer's facility. *Id.* at 473-74, 125 S.Ct. 2655. The area to be developed contained approximately 115 privately owned properties and other land. *Id.* at 474, 125 S.Ct. 2655. The plan would take those properties and create a state park, a waterfront hotel with restaurants and shops, marinas for recreational and commercial uses, an urban neighborhood consisting of approximately eighty new residences, a United States Coast Guard Museum, more than 90,000 square feet of research and development office space next to the Pfizer facility, a 2.4-acre site used to support either the state park (by providing parking or retail services) or a marina, additional office and retail space, parking, land for

"water-dependent commercial uses," and a pedestrian riverwalk connecting the waterfront areas of the development *Id.* at 473-74, 125 S.Ct. 2655. The development plan was intended to "creat[e] jobs, generat[e] tax revenue, . . . build momentum for the revitalization of downtown New London, . . . make the City more attractive and [ ] create leisure and recreational opportunities on the waterfront and in the park." *Id.* at 474-75, 125 S.Ct. 2655 (citation and quotation marks omitted).

Plaintiffs were long-time residents of Fort Trumbull who owned properties that were condemned in order to create the aforementioned research and development office space and the 2.4-acre site to support the state park or a marina. *Id.* at 475, 125 S.Ct. 2655. Plaintiffs' properties were not blighted or otherwise in poor condition; "rather, they were condemned only because they happen[ed] to be located in the development area." *Id.* Plaintiffs sued in Connecticut state court, arguing that taking their properties would violate the public use requirement. *Id.* The state trial court enjoined the City of New London from taking any of the properties to be used for park or marina support but declined to enjoin the taking of properties to be used for office space. *Id.* 475-76, 125 S.Ct. 2655. Both sides appealed to the Supreme Court of Connecticut, which held that all of the proposed takings were valid because economic development was a public use under the Fifth Amendment and the takings were "reasonably necessary" to effectuate public use. *Id.* at 476-77, 125 S.Ct. 2655.

A five-justice majority of the United States Supreme Court affirmed. It began by citing two

uncontroversial propositions, neither of which adequately captured the case before the Court. *Id.* at 477, 125 S.Ct. 2655. The first was that "the sovereign may not take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation." *Id.* The majority derived this proposition from *Midkiff's* teaching that "[a] purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void." *Kelo* at 477, 125 S.Ct. 2655 (*quoting Midkiff*, 467 U.S. at 245, 104 S.Ct. 2321). In citing this proposition, the majority also wrote, without citing any precedent, "Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo* at 478, 125 S.Ct. 2655.

The majority observed that the case before it could not be resolved by relying only on this first proposition because the case did not concern a "purely private taking," and instead involved a "carefully considered" development plan, and because there was no evidence of any illegitimate purpose motivating the plan (such as a purpose to benefit Pfizer or another private entity). *Id.* at 478 & n. 6., 125 S.Ct. 2655. Indeed, the majority noted, the identities of the private entities who would benefit were not known when the plan was adopted, and "[i]t is, of course, difficult to accuse the government of having taken A's property to benefit the private interests of B when the identity of B was unknown." *Id.* at 478 n. 6, 125 S.Ct. 2655.

The second uncontroversial, but inapplicable, proposition was that "a State may transfer property

from one private party to another if future 'use by the public' is the purpose of the taking." *Id.* at 477, 125 S.Ct. 2655. The case did not fit this proposition because it was "not a case in which the City is planning to open the condemned land–at least not in its entirety–to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers." *Id.* at 478, 125 S.Ct. 2655.

The majority observed, however, that a taking could be constitutional even if it did not lead to "use by the public" of the taken property. *Id.* at 479-80, 125 S.Ct. 2655. Relying on *Berman, Midkiff*, and *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)[10], the majority observed that "public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power." *Kelo* at 483, 125 S.Ct. 2655. Affirming the thrust of this jurisprudence, the majority ruled that "[b]ecause [the NLDC's] plan unquestionably serves a public purpose"–which the Court characterized as "a program of economic rejuvenation"– "the takings challenged here satisfy the public use requirement of the Fifth Amendment." *Id.* at 483-84, 125 S.Ct. 2655. In so ruling, the majority rejected the plaintiff's proposed holding "that economic development does not qualify as

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[10] In *Ruckelshaus*, the Supreme Court upheld a statute permitting the Environmental Protection Agency to consider the trade secrets of a prior pesticide applicant when reviewing a subsequent applicant who pays just compensation to the prior applicant.

a public use," writing that "there is no basis for exempting economic development from our traditionally broad understanding of public purpose." *Id.* at 484, 125 S.Ct. 2655.

The majority also rejected two assertions made by the *Kelo* dissenters. The first was that in *Berman,* the Court held merely that the elimination of blight is a public use. The majority read *Berman* more broadly: "The public use described in *Berman* extended beyond [eliminating blight] to encompass the purpose of *developing* that area to create conditions that would prevent a reversion to blight in the future." *Kelo* at 484 n. 13, 125 S.Ct. 2655 (*citing Berman,* 348 U.S. at 34-35, 75 S.Ct. 98) (emphasis in original). The second assertion was that "the government may only take property and transfer it to private parties when the initial taking eliminates some 'harmful property use.'" *Kelo* at 486 n. 16, 125 S.Ct. 2655. In rejecting this assertion, the *Kelo* majority observed that "[t]here was nothing 'harmful' about the nonblighted department store at issue in *Berman*" or the trade secrets at issue in *Ruckelshaus. Id.*

Finally, the majority rejected the plaintiffs' proposal that courts "require a 'reasonable certainty' that the expected public benefits will actually accrue." *Id.* at 487, 125 S.Ct. 2655. The majority deemed this proposal impractical:

> The disadvantages of a heightened form of review are especially pronounced in this type of case. Orderly implementation of a comprehensive redevelopment plan obviously requires that the legal rights of all interested

> parties be established before new construction can be commenced. A constitutional rule that required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans.

Id. at 488, 125 S.Ct. 2655. In support of this conclusion, the majority quoted and affirmed *Midkiff's* deferential approach to evaluating takings: "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings–no less than debates over the wisdom of other kinds of socioeconomic legislation–are not to be carried out in the federal courts." *Id.* (*quoting Midkiff,* 467 U.S. at 242, 104 S.Ct. 2321).

Justice Kennedy, who joined the majority opinion in its entirety, issued a concurrence in which he wrote that "[a] court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits." *Id.* at 491, 125 S.Ct. 2655. Justice Kennedy derived this rule from two Equal Protection cases. In the first, the Supreme Court considered a provision of the Food Stamp Act of 1964 that excluded from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household. *U.S. Dep't of Agric. v. Moreno,* 413 U.S. 528, 529, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973). The Court found that this provision failed

the rational-basis test because one possible purpose, "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program," was not a legitimate government purpose and the provision was not rationally related to the other ostensible purpose, preventing fraud. *Id.* at 533-36, 93 S.Ct. 2821.

In the second Equal Protection case, the Supreme Court held that the mentally retarded are not a class deserving special protection beyond that afforded by rational-basis review. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The Court observed that the mentally retarded are nevertheless protected by the Equal Protection Clause:

> Our refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination. To withstand equal protection review, legislation that distinguishes between the mentally retarded and others must be rationally related to a legitimate governmental purpose. This standard, we believe, affords government the latitude necessary both to pursue policies designed to assist the retarded in realizing their full potential, and to freely and efficiently engage in activities that burden the retarded in what is essentially an incidental manner. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Furthermore, some objectives–such as a bare desire to harm a politically unpopular group–are not legitimate state interests.

Id. at 446-447, 105 S.Ct. 3249 (citations, quotation marks, and ellipses within quotation marks omitted).

Justice Kennedy, reasoning by analogy to *Moreno* and *Cleburne*, wrote that "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Kelo* at 491, 125 S.Ct. 2655. He found that the trial court in *Kelo* had conducted such a review and had properly concluded that the primary motivation for the development plan was to take advantage of Pfizer's presence, rather than to benefit Pfizer or some other private entity. *Id.* at 492, 125 S.Ct. 2655. Justice Kennedy noted approvingly that the trial court's conclusion was based on extensive fact-finding:

> The trial court considered testimony from government officials and corporate officers; documentary evidence of communications between these parties; respondents' awareness of New London's depressed economic condition and evidence corroborating the validity of this concern; the substantial commitment of public funds by the State to the development project before most of the private beneficiaries were known; evidence that respondents reviewed a variety of development plans and chose a private developer from a group of applicants rather than picking out a particular transferee beforehand; and the fact that the other private beneficiaries of the project are still unknown

> because the office space proposed to be built has not yet been rented.

Id. at 491-92, 125 S.Ct. 2655 (citations, quotation marks, and ellipses within quotation marks omitted).

Justice Kennedy wrote that although there may be takings cases in which a more stringent standard of review than that set forth in *Berman* and *Midkiff* ought to apply, *Kelo* was not such a case because (1) the *Kelo* taking "occurred in the context of a comprehensive development plan meant to address a serious city-wide depression," (2) "the projected economic benefits of the project cannot be characterized as *de minimis*," (3) "[t]he identity of most of the private beneficiaries [of the *Kelo* project] were unknown at the time the city formulated its plans," and (4) "[t]he city complied with elaborate procedural requirements that facilitate review of the record and inquiry into the city's purposes." *Id.* at 493, 125 S.Ct. 2655.

Four justices dissented in *Kelo*, finding that the purposes served by the takings were "incidental public benefits resulting from the [ ] ordinary use of private property" and concluding that such benefits should not "render economic development takings 'for public use'" under the Fifth Amendment. *Id.* at 494, 125 S.Ct. 2655.

The dissenters read *Berman* and *Midkiff* as holding that "in certain circumstances and to meet certain exigencies, takings that serve a public purpose [ ] satisfy the Constitution even if the property is destined for subsequent private use." *Kelo* at 498, 125 S.Ct.

2655. The dissenters emphasized that those cases did not abrogate the "bedrock principle" that "[a] purely private taking could not withstand the scrutiny of the public use requirement." *Id.* at 500, 125 S.Ct. 2655 (*quoting Midkiff* at 245, 104 S.Ct. 2321).

Though the dissenters would affirm the results of *Berman* and *Midkiff*, they did not believe that public use is coterminous with the police power, a rule they attributed to "errant language" in *Berman* and *Midkiff*. *Id.* at 501, 125 S.Ct. 2655. Rather, the dissenters believed that the takings in *Berman* and *Midkiff* were upheld as public uses not because they were exercises of police power–which the *Kelo* dissenters agreed they were–but because they eliminated the harms of blight and concentrated ownership, respectively. *Id.* at 500-01, 125 S.Ct. 2655. "Because each taking *directly* achieved a public benefit, it did not matter that the property was turned over to private use." *Id.* at 500, 125 S.Ct. 2655 (emphasis in original). The passage stating that the public use requirement is coterminous with the police power was therefore *dicta*. *Id.* "Here, in contrast, New London does not claim that [the plaintiffs'] well-maintained homes are the source of any social harm." *Id.*

The dissenting justices criticized both the majority and Justice Kennedy for proposing that the judiciary inquire into the motivations underlying a taking:

> Even if there were a practical way to isolate the motives behind a given taking, the gesture toward a purpose test is theoretically flawed. If it is true that incidental public benefits from new private use are enough to ensure the

> "public purpose" in a taking, why should it matter, as far as the Fifth Amendment is concerned, what inspired the taking in the first place? How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public. And whatever the reason for a given condemnation, the effect is the same from the constitutional perspective-private property is forcibly relinquished to new private ownership.

Kelo at 502-03, 125 S.Ct. 2655.

Justice Thomas, who joined the dissent just described, also wrote separately to express that the majority opinion "is simply the latest in a string of [Supreme Court] cases construing the Public Use Clause to be a virtual nullity, without the slightest nod to its original meaning." *Id.* at 506, 125 S.Ct. 2655. Justice Thomas agreed that the judiciary should not review the wisdom of takings legislation, but he felt that the majority opinion invited such review:

> I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. It is difficult to imagine how a court could find that a taking was purely private

> except by determining that the taking did not, in fact, rationally advance the public interest.

Id. at 520-21, 125 S.Ct. 2655 (citations omitted). Justice Thomas would therefore overrule *Berman* and *Midkiff* and would hold that a taking serves a public use only if it results in the government owning the property or the public having a legal right to use the property. *Id.* at 508, 521, 125 S.Ct. 2655.

4. Application to the Present Case

In the line of cases just discussed, the Supreme Court held that a taking fails the public use requirement if and only if the uses offered to justify it are "palpably without reasonable foundation," *Midkiff* at 241, 104 S.Ct. 2321, such as if (1) the "sole purpose" of the taking is to transfer property to a private party, *Kelo* at 477, 125 S.Ct. 2655; *Midkiff* at 245, 104 S.Ct. 2321, or (2) the asserted purpose of the taking is a "mere pretext" for an actual purpose to bestow a private benefit, *Kelo* at 478, 125 S.Ct. 2655. I will consider whether this case fits into either of these two categories. In doing so, I will apply the recently announced rule that in order to survive a motion to dismiss for failure to state a claim, Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, ----, 127 S.Ct. 1955, 1974, 167 L.Ed.2d 929 (2007). If they instead "have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.*

a. "Sole Purpose" to Transfer Property to a Private Party

Plaintiffs argue that the uses offered to justify the Project, which are listed *supra* at 258, are chimerical because (1) the Project will generate no or minimal economic benefits, (2) the Project will not create jobs, (3) the area to be condemned is not blighted, and (4) the Project will not materially increase available affordable housing. (Am. Compl. ¶ 140.) Plaintiffs therefore would ask this court or a jury to conclude that "[t]he public does not benefit from the taking of Plaintiffs' properties" at all. (*Id.* ¶ 135.)

That conclusion is baseless and may be rejected even at this early stage of the litigation. Each of the four allegations just listed, when examined carefully, concerns only the measure of a public benefit–as opposed to its existence–or otherwise fails to state a claim. First, although Plaintiffs allege that the net gain in tax revenues will be lower than Defendants have predicted, they do not allege that there will be no net gain. (*Id.* ¶¶ 90-97.) Second, and similarly, although Plaintiffs allege that Defendants' claims about job creation are overstated, they do not suggest that the Project will fail to create jobs. (*Id.* ¶¶ 117-20.)

Third, Plaintiffs assert either that the Takings Area is not blighted or that whatever blight may exist was caused by FCRC. But Plaintiffs do not dispute that the majority of the Project Area–which encompasses the Takings Area–is blighted, and in fact they seem to

concede that it is.[11] (*Id.* ¶¶ 55, 57-58, 98-106.) In addition, the blight study conducted by the ESDC, which is incorporated by reference into Plaintiffs' allegations, indicates that the Takings Area is blighted. (Blight Study at C-70 to C-242.) The Project is therefore permissible even if Plaintiffs' own properties are not blighted, because "[p]roperty may of course be taken for [ ] redevelopment which, standing by itself, is innocuous and unoffending" if the redevelopment is intended to cure and prevent reversion to blight in some larger area that includes the property. *Berman,* 348 U.S. at 35, 75 S.Ct. 98.

Fourth, Plaintiffs allege that the Project might result in fewer units of affordable housing than Defendants predict and that "[v]iewed from the perspective of residents' income, the affordable units proposed from the Project will not remotely offset the impact of the luxury housing" that the Project will provide. (Am. Compl. ¶¶ 107-16.) But Plaintiffs do not allege that the Project will fail to achieve a significant net increase in housing units in the area, and it is clear that it is intended to do so.[12] Whether these units are

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[11] Defendants have explained, and the Amended Complaint appears to concede, that the ATURA area, which comprises a significant portion of the Project Area, has been designated blighted ten times, first in 1968 and most recently in 2004. (ESDC's 12/15/06 Br. at 5; Am. Compl. ¶¶ 55, 57.)

[12] Whether the Project will in fact achieve this or any other objective is not a matter that this court may consider. *Kelo,* 545 U.S. at 488, 125 S.Ct. 2655 (rejecting the argument that courts should require a "reasonable certainty" that expected public benefits will accrue; reasoning that "[a] constitutional rule that

sufficiently affordable may be an important political question, and if the citizens of Brooklyn are unsatisfied with the answers, then elected officials and their political parties may pay the price at the polls. But the Constitution does not enshrine Plaintiffs' value judgment that a taking lacks a public purpose if it results in "luxury" as opposed to "affordable" housing, and the constitutionality of this taking does not depend on the relative numbers of planned housing units priced at, above, or below market rate.

Plaintiffs also do not allege that the Project's non-quantifiable public benefits are false. For example, the new arena will be the home of a professional basketball team. Although Plaintiffs allege that the arena will generate less than $1 million in annual tax revenue (Am. Compl. ¶ 96), they do not allege that having a professional team in Brooklyn is not in itself a benefit to the public. Nor do they allege that the various uses planned for the Vanderbilt Rail Yard, a dormant part of the blighted ATURA area, will fail to benefit the public by their very effectuation, and not merely by their power to generate revenue.

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required postponement of the judicial approval of every condemnation until the likelihood of success of the plan had been assured would unquestionably impose a significant impediment to the successful consummation of many such plans").

b. Asserted Purposes Are a "Mere Pretext" for an Actual Purpose to Bestow a Private Benefit

Although Plaintiffs do not allege facts sufficient to render plausible their claim that the Project serves no public use at all, they also claim that any benefits to the public are "secondary and incidental to the benefit that inures to FCRC" and that "Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor in Defendants' decision to seize Plaintiffs' property and transfer it to FCRC." (Am. Compl. ¶¶ 136-37.) This court must therefore consider whether Plaintiffs have sufficiently alleged that the purposes offered to justify the Project are "mere pretexts" and that the "actual purpose" of the Project is "to bestow a private benefit" on FCRC. *Kelo*, 545 U.S. at 478, 125 S.Ct. 2655.

Although *Kelo* held that merely pretextual purposes do not satisfy the public use requirement, the *Kelo* majority did not define the term "mere pretext" or cite any case in which a taking was found to be unconstitutional on the ground that its purposes were merely pretextual. *Id.* The Second Circuit has not yet had the opportunity to articulate the standard according to which this court should measure whether an asserted use is merely pretextual. In the absence of such guidance, this court will adopt Justice Kennedy's understanding of the term "mere pretext" as set forth in his concurrence in *Kelo*.

As discussed in greater detail *supra* at 283-85, Justice Kennedy derived a public-use rule from Equal Protection case law. Justice Kennedy wrote:

> A court applying rational–basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational–basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications.

Kelo at 491, 125 S.Ct. 2655. Justice Kennedy therefore instructed that "[a] court confronted with a *plausible* accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit, though with the presumption that the government's actions were reasonable and intended to serve a public purpose." *Id.* (emphasis added). This instruction is consistent with the rule that a plaintiff must allege "enough facts to state a claim to relief that is *plausible*" in order to survive a motion to dismiss for failure to state a claim. *Twombly,* 127 S.Ct. at 1974 (emphasis added).

Plaintiffs have not set forth facts supporting a plausible claim of an unconstitutional taking. Nowhere in the Amended Complaint or their briefs do Plaintiffs sufficiently allege any purpose to confer a private benefit. In other words, Plaintiffs attempt to satisfy the "mere pretext" test solely by alleging that the purported purposes of the Project are dubious, but *Kelo* requires them to allege that the "actual purpose" of the Project is "to bestow a private benefit" on FCRC. *Id.* at 478, 125 S.Ct. 2655. In fact, Justice Kennedy,

analogizing to Equal Protection jurisprudence, would require "a clear showing [that a taking] is intended to favor a particular private party" before the taking is ruled unconstitutional. *Id.* at 491, 125 S.Ct. 2655. Plaintiffs do not allege any facts suggesting that any Defendant had any reason to bestow a benefit on any private party. Therefore, even if Plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project are "mere pretexts" within the meaning of *Kelo, i.e.,* mere pretexts for an actual purpose to bestow a private benefit.

Plaintiffs of course allege that "[b]y taking plaintiffs' property and giving it to FCRC, defendants intend to benefit FCRC" and that "Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants' decision to seize plaintiffs' property and transfer it to FCRC." (Am. Compl. ¶¶ 133, 137.) Such a conclusory allegation is not sufficient to withstand a motion to dismiss. In *Twombly,* in which the Supreme Court considered a claim of antitrust conspiracy, the Court explained that-

> [S]tating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

127 S.Ct. at 1965. The sole or primary fact alleged by the plaintiffs in *Twombly* was parallel conduct by Incumbent Local Exchange Carriers (the "Baby Bells" created by the divestiture of AT & T) in their dealings with Competitive Local Exchange Carriers. *Id.* at 1962-63. The Supreme Court found that "[t]he inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 1964.

Although *Twombly* has not yet been applied in an eminent-domain case, I believe it is appropriate to do so. I note first that because Justice Kennedy, the fifth vote in the *Kelo* majority, would require a plaintiff challenging a taking to assert "a *plausible* accusation of impermissible favoritism to private parties," *Kelo* at 491, 125 S.Ct. 2655 (Kennedy, J., concurring) (emphasis added), the plausibility standard recognized in *Twombly* arguably applied to eminent-domain cases even before *Twombly* was decided.

More importantly, however, the plausibility standard announced in *Twombly* was intended to apply beyond antitrust-conspiracy cases. Were this not so, then *Twombly* would not have addressed *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), formerly the leading case regarding motions to dismiss for failure to state a claim, in the manner in which it did. *Conley* held that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." *Id.* at 45-46, 78 S.Ct. 99. The Supreme Court could have used *Twombly* to announce a narrow exception to *Conley* for claims of antitrust conspiracy. Instead, however, the Court explained that *Conley* has been widely misunderstood and that a court applying a "focused and literal reading of *Conley's* 'no set of facts'" rule would improperly decline to dismiss "a wholly conclusory statement of claim." *Twombly* at 1968. This, the Court explained, was the mistake the Second Circuit made when it reversed the district court's dismissal of Twombly's complaint. *Id.* at 1968-69. The Supreme Court therefore announced that-

> [A]fter puzzling the profession for 50 years, this famous observation [*i.e.*, the "no set of facts" rule] has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley,* then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

Twombly at 1969 (citations and footnote omitted). The generality of this discussion strongly suggests that *Twombly* applies more broadly to all civil cases rather than only to claims of antitrust conspiracy.

I note two additional grounds in further support of my obligation to apply *Twombly* in this case. First, the *Twombly* Court derived the plausibility rule at least in part from Fed. R. Civ. P. 8, which applies to all federal

civil litigation. *Twombly* at 1966. Second, *Twombly* also relied on practical concerns, such as deterring the filing of frivolous cases and avoiding discovery in such cases, *Id.* at 1966-67, that are relevant to all areas of civil litigation (although I recognize that those concerns may be more pronounced in antitrust-conspiracy cases than in most other types of cases).

Under *Twombly,* Plaintiffs' claim that the public use requirement has been violated must be dismissed. As in *Twombly,* the facts alleged by Plaintiffs in the present case–the taking of property from some private parties and the resulting benefit to other private parties–are as consistent with lawful behavior as with unlawful behavior. There is no doubt that the Constitution permits property to be transferred from one private party to another if the transfer serves a public use. *Berman,* 348 U.S. at 33-34, 75 S.Ct. 98. For that reason, Plaintiffs' allegations, which include such a transfer but concede a variety of public uses, cannot constitute "plausible grounds to infer," *Twombly* at 1965, an "actual purpose [ ] to bestow a private benefit." *Kelo,* 545 U.S. at 478, 125 S.Ct. 2655.[13]

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[13] I have reviewed the Supreme Court's recent grant of *certiorari* in *Erickson v. Pardus,* No. 06-7317, 2007 WL 1582936 (U.S. June 4, 2007). *Erickson* does not alter this court's application of *Twombly* to the present case. In *Erickson,* the Supreme Court cited *Twombly* and suggested that Tenth Circuit erred in affirming the dismissal of a complaint as conclusory. However, the plaintiff in *Erickson* alleged facts that, if true, would give rise to liability. In contrast, the plaintiffs in *Twombly* and the present case alleged facts that are as consistent with lawful behavior as with unlawful behavior.

* * *

Plaintiffs' allegations are not plausible grounds to infer that the asserted public uses of the Project are "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241, 104 S.Ct. 2321. Because Plaintiffs concede that the Project will create large quantities of housing and office space, as well as a sports arena, in an area that is mostly blighted, Plaintiffs' allegations, if proven, would not permit a reasonable juror to conclude that the "sole purpose" of the Project is to confer a private benefit. Neither would those allegations permit a reasonable juror to conclude that the purposes offered in support of the Project are "mere pretexts" for an actual purpose to confer a private benefit on FCRC. For these reasons, Count One of the Amended Complaint, in which Plaintiffs assert a Section 1983 claim alleging a violation of the Taking Clause, is dismissed.

D. Equal Protection and Due Process

Plaintiffs also claim that the taking of their property violates their equal protection and due process rights. (Am. Compl. ¶¶ 149-70.) These claims are based on the same facts as the Takings Clause claim.

The Equal Protection Clause of the Fourteenth Amendment provides that no state may "deny to any person within its jurisdiction the equal protection of the laws." When, as in this case, "a statutory classification [ ] neither proceeds along suspect lines nor infringes fundamental constitutional rights," the classification "must be upheld against equal protection

challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *F.C.C. v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993); *see also Jankowski-Burczyk v. I.N.S.*, 291 F.3d 172, 178 (2d Cir. 2002). As already discussed, the takings at issue are rationally related to a legitimate governmental purpose. Those takings therefore do not offend the Equal Protection Clause.

The Due Process Clause of the Fourteenth Amendment provides that no state may "deprive any person of life, liberty, or property, without due process of law." Plaintiffs allege that Defendants deprived them of their property without due process of law by "providing an empty, meaningless process with a pre-determined outcome." (Am. Compl. ¶ 164.) The Second Circuit has rejected the notion that the process set forth in the EDPL is "empty" or "meaningless." In *Brody v. Vill. of Port Chester*, 434 F.3d 121 (2d Cir. 2005), the Second Circuit held that the procedures available under EDPL § 207, though "limited in scope," are "appropriate given the narrow role that the courts play in ensuring that [a] condemnation is for a public use." *Id.* at 134. The Second Circuit therefore held that those procedures satisfy the constitutional requirement of due process. *Id.* at 136. This court must therefore dismiss Plaintiffs' due process claim.

For these reasons, Counts Two and Three of the Amended Complaint, in which Plaintiffs assert Section 1983 claims alleging violations of the Equal Protection and Due Process Clauses of the Fourteenth Amendment, respectively, are dismissed.

E. EDPL § 207

Plaintiffs also assert a claim for judicial review under EDPL § 207. (Am. Compl. ¶¶ 171-80.) Having dismissed the claims over which this court has original jurisdiction, I decline to exercise supplemental jurisdiction over the Section 207 claim. 28 U.S.C. § 1367(c)(3). The Section 207 claim, stated in Count Four of the Amended Complaint, is therefore dismissed without prejudice to its being re-filed in state court. *E & L Consulting, Ltd. v. Doman Indus. Ltd.*, 472 F.3d 23, 33 (2d Cir. 2006); *Giordano v. City of New York*, 274 F.3d 740, 754 (2d Cir. 2001).

IV. Conclusion

For the reasons set forth in this Memorandum and Order, Defendants' motion to dismiss is granted. Pursuant to the Stipulation and Order dated March 8, 2007 (Docket No. 85), both the Goldstein case (06-CV-5827) and the Piller case (07-CV-152) are therefore dismissed. Counts One, Two, and Three of the Amended Complaint are dismissed with prejudice. Count Four of the Amended Complaint is dismissed without prejudice to its being re-filed in state court.

SO ORDERED.

Dated: June 6, 2007
Brooklyn, N.Y.

/s/_____
Nicholas G. Garaufis
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 06CV-5827 (NGG)(RML)

[Filed February 23, 2007]

Daniel Goldstein, *et al.*,	)
Plaintiffs,	)
	)
-against-	)
	)
George E. Pataki, *et al.*,	)
Defendants.	)
	)

REPORT AND RECOMMENDATION

LEVY, United States Magistrate Judge.

All defendants move to dismiss the complaint, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. On November 21, 2006, the Honorable Nicholas G. Garaufis, United States District Judge, referred the motions to me for Report and Recommendation. Briefing was completed on February 1, 2007, and this court heard oral argument on February 7, 2007. For the reasons stated below, I

respectfully recommend that defendants' motions be granted.

BACKGROUND AND PROCEDURAL HISTORY

A. *The Plaintiffs and Their Claims*

Plaintiffs Daniel Goldstein, Jerry Campbell (as the putative administrator of the estate of Oliver St. Clair Stewart and in his individual capacity), The Gelin Group, LLC, Chadderton's Bar and Grill Inc. d/b/a/ Freddy's Bar and Backroom, Maria Gonzalez, Jackie Gonzalez, Yesenia Gonzalez, Huda Mufleh-Odeh, Jan Akhtar, David Sheets, Joseph Pastore, Peter Williams, Peter Williams Enterprises, Inc., Henry Weinstein, 535 Carleton Ave. Realty Corp., 535 Carlton Ave. Realty Corp., and Pacific Carlton Development Corp. (collectively, "plaintiffs") commenced this action on October 26, 2006[1] seeking to enjoin the exercise of eminent domain to seize their properties in connection with a project known as the Atlantic Yards Arena and Redevelopment Project (the "Atlantic Yards Project" or the "Project"). As currently proposed, the Project is a mixed-use redevelopment project that would cover approximately twenty-two acres of land in and around the Metropolitan Transportation Authority's Vanderbilt Yards in Brooklyn, New York. (*See* Amended Complaint, dated Jan. 5, 2007 ("Am. Compl."), at 2 n. 1.) It includes a sports arena with

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[1] Plaintiffs amended their complaint on January 5, 2007 to, *inter alia*, add some of the named plaintiffs listed above and eliminate a claim against former Governor Pataki in his official capacity. (*See* Amended Complaint, dated Jan. 5, 2007.)

seating capacity for approximately 20,500,[2] sixteen high-rise apartment and office towers containing approximately eight million square feet of residential, office and commercial space, and a 180-room hotel. (*Id.*)

Plaintiffs own or rent property within the footprint of the Project. (*See id.* ¶¶ 6-21.)[3] They challenge the use of eminent domain under 42 U.S.C. § 1983,[4] asserting claims under the Fifth Amendment's Takings Clause (as incorporated by the Fourteenth Amendment), which prohibits the taking of private property "for public use, without just compensation,"[5]

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[2] The arena is slated to be home to the New Jersey Nets National Basketball Association Team. (*See* Declaration of Douglas M. Kraus, Esq., dated Dec. 15, 2006, Ex. E.)

[3] Plaintiffs Daniel Goldstein, Jerry Campbell, the Estate of Oliver St. Clair Stewart, The Gelin Group LLC, Peter Williams, Peter Williams Enterprises, Inc., 535 Carleton Ave. Realty Corp., 535 Carlton Ave. Realty Corp., Henry Weinstein, and Pacific Carlton Development Corp. own and control real property. (Am. Compl. ¶¶ 6-8.) Plaintiff Chadderton's Bar and Grill Inc. d/b/a Freddy's Bar and Backroom has a lease for operation of a commercial enterprise. (*Id.* ¶ 9.) Plaintiffs Maria Gonzalez, Jackie Gonzalez, Yesenia Gonzalez, Huda Mufleh-Odeh, Jan Akhtar, David Sheets, and Joseph Pastore are residential tenants. (*Id.* ¶¶ 14-20.)

[4] Section 1983 imposes liability on persons–including, by judicial construction, municipalities and other state agencies–who, acting under color of state law, deprive others of rights secured by the Constitution and federal laws. 42 U.S.C. § 1983 (2000).

[5] Similarly, Article 1, § 7(a) of the New York State constitution provides that "[p]rivate property shall not be taken for public use

and the Fourteenth Amendment's Equal Protection[6] and Procedural Due Process[7] Clauses. (*See id.* ¶¶ 131-170.) They also assert a supplemental state law claim under New York Eminent Domain Procedure Law ("EDPL") § 207. (*Id.* ¶¶ 171-180.)[8] Plaintiffs contend

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without just compensation." However, the Amended Complaint contains no claim under the state constitution.

[6] For their Equal Protection claim, plaintiffs allege that "[b]y selecting plaintiffs' properties to be taken for the purpose of conferring a benefit, here the plaintiffs' property, to [the private developer], defendants have targeted plaintiffs for adverse treatment for no rational purpose." (Am. Compl. ¶ 151.) As plaintiffs' counsel conceded at oral argument, this claim "will rise or fall with the public use claim." (Transcript of Oral Argument, dated Feb. 7, 2007 ("Tr."), at 51.)

[7] Plaintiffs allege that defendants have deprived them of their property interests without due process of law by, *inter alia*," (1) circumventing local and community review and local zoning regulations; (2) failing to provide sufficient time to meaningfully respond between the release of the Draft Environmental Impact Statement and the hearing on August 23, 2006; (3) failing to provide a hearing that allowed plaintiffs to meaningfully state their objections; and (4) at all times providing an empty, meaningless [ ] process, with a pre-determined outcome. . . ." (Am. Compl. ¶ 164.)

[8] This claim is only asserted against the Empire State Development Corp. The Amended Complaint also asserted a claim under EDPL § 204(A) (*see* Am. Compl. ¶ 178 (alleging that the Determination and Findings are null and void because they were not made within 90 days of the close of the public hearing), but plaintiffs have since withdrawn that claim. (*See* Plaintiffs' Opposition to Defendants' Motion to Dismiss Plaintiffs' Supplemental EDPL Claims, dated Jan. 26, 2007, at 14 n. 5.)

that the Project, which they describe as "the single largest multi-use real estate development in the history of the City of New York," constitutes "a betrayal of public trust in service of the interests of a private developer," namely defendant Bruce C. Ratner ("Ratner") and the companies he owns or controls. (*Id.* ¶ 2.) They accuse City and State officials of acting in concert with Ratner for the purpose of conferring a private benefit on the developer, who allegedly conceived of and initiated the Project. (*Id.*) They further maintain that "public input and review has been a sham" and that the defendants' findings of blight in the area are pretextual, as are their claims that the Project will result in a net economic benefit to the City and State, create significant affordable housing, and create thousands of new jobs. (*Id.* ¶¶ 4, 89-120.) Plaintiffs have stated that they intend to move for a preliminary injunction.

B. *The Defendants and Their Motions*

The defendants fall into four groups. They are: (1) the New York State Urban Development Corporation d/b/a the Empire State Development Corporation (the "ESDC"), a state public benefit corporation created pursuant to the New York State Urban Development Corporation Act of 1968 (the "UDC Act") and imbued by the New York legislature with eminent domain power (*see* N.Y. UNCONSOL. LAWS § 6263); and the ESDC's Chairman and Chief Executive Officer, Charles A. Gargano, sued in both his official and individual capacities; (2) former Governor George E. Pataki, sued in his individual capacity; (3) the City of New York; the New York City Economic Development Corporation; Mayor Michael Bloomberg; Deputy Mayor

Daniel L. Doctoroff; Andrew Alper, former President of the New York City Economic Development Corporation; and Joshua Sirefman, Acting President of the New York City Economic Development Corporation, all sued in both their official and individual capacities (collectively, the "City defendants"); and (4) Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Company, Ratner Group, Inc., BR FCRC, LLC, BR Land, LLC, FCR Land, LLC, Brooklyn Arena, LLC, and Atlantic Yards Development Company, LLC (collectively, the "Forest City Ratner defendants").

All defendants move to dismiss the complaint on the grounds that it is not ripe and that it fails to state a claim upon which relief can be granted. They also urge this court to abstain from exercising federal jurisdiction under *Younger v. Harris,* 401 U.S. 37 (1971), or *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

In addition to arguing that the complaint fails to state a claim under the public use clause, the Forest City Ratner defendants contend that plaintiffs' assertions of favoritism and of a "sham" review process "amount to a claim that defendants have acted corruptly and perpetrated a fraud on the public," which purportedly fails to comport with the heightened pleading requirement of Fed. R. Civ. P. 9(b). (*See* Forest City Ratner Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint, dated Dec. 15, 2006, at 19 n. 14, 23-24.) They also challenge plaintiffs' equal protection and due process claims as insufficient. (*Id.* at 24-28.)

Governor Pataki moves separately to dismiss the claims against him in his individual capacity on the grounds that plaintiffs do not allege his personal involvement in the alleged constitutional deprivation and because he is entitled to qualified immunity. (*See* Memorandum of Law of Defendant George E. Pataki in Support of His Motion to Dismiss the Complaint, dated Dec. 15, 2006 ("Pataki Mem."), at 10-13; Reply Memorandum of Law of Governor George E. Pataki in Support of His Motion to Dismiss the Amended Complaint, dated Jan. 19, 2007 ("Pataki Reply Mem.").) The Governor also argues that the claims against him in his individual capacity are moot, as he completed his term of office on December 31, 2006, prior to the taking of plaintiffs' properties. (Pataki Mem. at 13-14; Pataki Reply Mem. at 4-6.)

Last, the City defendants move separately to dismiss the claims against them in both their individual and official capacities. (*See* Memorandum of Law in Support of City Defendants' Motion to Dismiss the Complaint, dated Dec. 15, 2006.) They argue that the Amended Complaint does not support the imposition of liability against them in their individual capacities because it does not allege specific facts showing each defendant's personal involvement in the condemnations. (*Id.* at 3-5.) They also contend that they are entitled to qualified immunity under section 1983 because it was objectively reasonable for them to believe that their conduct did not violate the law. (*Id.* at 6-7.) Finally, they maintain that the Amended Complaint does not state a cause of action against them in their official capacities because it does not allege that either the City or the EDC is the "moving force" behind the challenged condemnation

proceedings. (*Id.* at 7-8.) Although plaintiffs allege that all of the defendants conspired with each other to deprive them of their constitutional rights, the City defendants argue that the allegations concerning their role in the purported conspiracy should be dismissed as "conclusory" and "nonspecific." (*Id.* at 8.)

C. *The Eminent Domain Procedure Law*

For purposes of context, a description of New York's EDPL, which provides a detailed and comprehensive statutory scheme for the taking of property, is in order. Until the state legislature enacted the EDPL in 1977, eminent domain powers were exercised through a patchwork of more than 150 disparate state and local provisions. *Jackson v. N.Y. State Urban Dev. Corp.*, 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429, 436 (N.Y. 1986). Briefly, Article 2 of the EDPL sets forth the procedures that most condemnors must follow prior to acquiring property. Specifically, it requires condemnors to hold a non-judicial public hearing to review the public use of the proposed project and its impact on the environment. *See* EDPL § 201 (McKinney 2003 & Supp. 2006). Further, the EDPL requires that condemnors give notice of the hearing by publication and, since January 2005, requires that affected property owners be given individualized notice, either by personal service or certified mail. *See id.* § 202. Within ninety days of the conclusion of public hearings, the condemnor is required to publish its Determination and Findings, *see id.* § 204(A), which triggers an exclusive thirty-day period in which such Determination and Findings may be appealed in the Appellate Division. *See id.* § 207. The Determination and Findings must specify "(1) the public use, benefit

or purpose to be served by the proposed public project; (2) the approximate location for the proposed public project and the reasons for selection of that location; (3) the general effect of the proposed project on the environment and residents of the locality." *Id.* § 204(B). Recent amendments to the EDPL also require that individuals whose properties are being condemned be given individualized notice of both the publication of the Determination and Findings and the thirty-day time limit on judicial challenges thereto. *See id.* § 204(C).

Section 207(B) of the EDPL states that, once a condemnee challenges the Determination and Findings in the Appellate Division, the "jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final subject to review by the court of appeals. . . ." The scope of review in the Appellate Division is narrow. It is "limited to whether: (1) the proceeding was in conformity with the federal and state constitutions, (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority, (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and (4) a public use, benefit or purpose will be served by the proposed acquisition." *Id.* § 207(C).[9] "'The principal purpose of EDPL article 2 is to insure that [a condemnor] does not acquire property without having

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[9] In certain circumstances, not relevant here, a condemnor may be exempt from compliance with the requirements of Article 2. *See* EDPL § 206.

made a reasoned determination that the condemnation will serve a valid public purpose.'" *Waldo's Inc. v. Vill. of Johnson City,* 141 A.D.2d 194, 534 N.Y.S.2d 723, 725 (3d Dep't 1988) (quoting *Jackson,* 67 N.Y.2d 400, 503 N.Y.S.2d 298, 494 N.E.2d 429), *aff'd,*74 N.Y.2d 718, 544 N.Y.S.2d 809, 543 N.E.2d 74 (N.Y. 1989); *accord Woodfield Equities, LLC v. Inc. Vill. of Patchogue,* 28 A.D.3d 488, 813 N.Y.S.2d 184 (2d Dep't 2006).

Upon filing a petition pursuant to EDPL § 207, the petitioner must serve a demand on the condemnor to file with the court a written transcript of the public hearing and a copy of its Determination and Findings. *See* EDPL § 207(A). The proceeding is then heard "on the record," with no discovery or evidentiary hearing. *Id. See also Kaufmann's Carousel, Inc. v. City of Syracuse Indus. Dev. Agency,* 301 A.D.2d 292, 750 N.Y.S.2d 212, 222 (4th Dep't 2002) (newspaper article appended to the EDPL petition challenging the condemnor's Determination and Findings was outside the record and therefore could not be considered by the Appellate Division), *leave to appeal denied,* 99 N.Y.2d 508, 757 N.Y.S.2d 819, 787 N.E.2d 1165 (N.Y. 2003); *Waldo's, Inc.,* 534 N.Y.S.2d at 725 (stating that EDPL § 207" does not provide for . . . adversarial proceedings."); *Vill. Auto Body Works, Inc. v. Inc. Vill. of Westbury,* 90 A.D.2d 502, 454 N.Y.S.2d 741, 743 (2d Dep't 1982) (EDPL § 207" contemplates a summary review procedure. This court is to review the record and either reject or confirm the findings of the condemning authority.").

Article 3 of the EDPL then controls the making of compensation offers for property that is subject to condemnation. The preamble to Article 3 states that

the public policy of New York favors negotiated settlements. EDPL § 301. However, "the condemnor fulfills[ ] the requirements of EDPL § 303 by making an offer to respondent property owners that 'it believes to represent just compensation for the real property to be acquired.' There is no requirement that petitioner 'plead or prove, as a prerequisite to the acquisition of property by eminent domain, that it negotiated in good faith with the [property] owner[s].'" *Nat'l Fuel Gas Supply Corp. v. Town of Concord,* 299 A.D.2d 898, 752 N.Y.S.2d 187, 189 (4th Dep't 2002) (quoting *Oswego Hydro Partners L.P. v. Phoenix Hydro Corp.,* 163 A.D.2d 829, 559 N.Y.S.2d 841, 841 (4th Dep't 1990)); *see also Matter of County of Tompkins,* 237 A.D.2d 667, 654 N.Y.S.2d 849, 851 (3d Dep't 1997).

Under Article 4 of the EDPL, the condemnor may commence a proceeding to acquire title to the property up to three years after the later of: (1) publication of the Determination and Findings, or (2) entry of the final order or judgment on judicial review under § 207. (*See* EDPL § 401.) This is known as a "vesting proceeding," and the condemnor's petition must set forth (a) a statement of compliance with EDPL Article 2 (or with an exemption pursuant to EDPL 206); (b) a copy of the acquisition map; (c) a description of the property; (d) the public use; and (e) "a request that the court direct entry of an order authorizing the filing of the acquisition map . . . and that upon such filing, title shall vest in the condemnor." *Id.* § 402(B)(3). A condemnee opposing the taking may not wait until the condemnor initiates a vesting proceeding to raise its claims, but rather must seek review directly in the Appellate Division pursuant to EDPL § 207. *See City of New Rochelle v. O. Mueller, Inc.,* 191 A.D.2d 435,

594 N.Y.S.2d 301, 302 (2d Dep't 1993); *Matter of Farmington Access Rd.*, 156 A.D.2d 936, 549 N.Y.S.2d 236, 237 (4th Dep't 1989). In other words, if no prospective condemnee brings a claim in the Appellate Division pursuant to EDPL § 207, then the Article 4 proceeding is the first point of judicial review. Once the Article 4 proceeding is complete, just compensation may be adjudicated in the Court of Claims pursuant to Article 5.

In *Brody v. Vill. of Port Chester*, 434 F.3d 121, 133 (2d Cir. 2005), the Second Circuit held that the EDPL's post-determination review procedure for challenging public use satisfies due process. Although EDPL § 207 provides for a post-determination hearing that is "summary in nature, restricting both the issues that can be raised and the evidence the court will consider," the Second Circuit concluded that "[d]ue process does not require New York to furnish a procedure to challenge public use beyond that which it already provides." *Id.*

Plaintiffs have not brought a facial challenge to the EDPL. Nor do they allege that the ESDC has failed to comply with the EDPL's requirements.

D. *The Current Posture*

The Project was first announced in December 2003 (Am. Compl. ¶ 68), and Memoranda of Understanding concerning the Project were signed in early 2005. (*Id.* ¶¶ 670-72; Declaration of Douglas M. Kraus, Esq.,

dated Dec. 15, 2006 ("Kraus Decl."), Exs. A, B.) [10] In May 2005, the Metropolitan Transit Authority (the "MTA") issued a request for proposals for the purchase of the development rights attributable to the Vanderbilt Yards site, an 8.5-acre rail yard and bus depot within the Project's footprint. (Am. Compl. ¶ 75.) Two companies, including the Forest City Ratner Companies ("FCRC"), submitted formal bids (*id.* ¶¶ 77-78), and on July 27, 2005, the MTA's Board of Directors selected FCRC as the winning bidder. (*Id.* ¶ 79.)[11] On September 14, 2005, the MTA and FCRC formally announced the terms of an agreement. (*Id.* ¶ 80.) A "Blight Study" was performed by AKRF, Inc. and completed in July 2006. (*See* Declaration of Jeffrey L. Braun, Esq., dated Dec. 15, 2006 ("Braun Decl."), Ex. C.)[12] On July 18, 2006, ESDC issued a formal

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[10] Both Memoranda of Understanding were dated February 18, 2005 and were signed by FCRC, the ESDC, the City of New York, and the New York City Economic Development Corporation. (*See* Krauss Decl., Exs. A, B.)

[11] The other bidder was Extell Development Company. (Am. Compl. ¶ 78.)

[12] According to plaintiffs, FCRC paid for the blight study. (Am. Compl. ¶ 100.) The blight study concluded, *inter alia*, that the proposed Project site "has suffered from physical deterioration and relative economic inactivity for at least four decades." It described the site as "[d]ominated by an approximately 9-acre open rail yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties[.]" (Krauss Aff., Ex. D at B-1.) Plaintiffs contest this finding, arguing that it is a "classic *post-hoc* justification" and that the increase in vacant lots in the area

declaration that the Project qualified as a land use development and civic project under the UDC Act. (Am. Compl. ¶ 47; Kraus Decl., Ex. E.)[13] A Draft Environmental Impact Statement, prepared by AKRF, Inc. and Philip Habib & Associates pursuant to the State Environmental Quality Review Act, was also released on July 18, 2006. (Braun Decl., Ex. B .)

On August 23, 2006, ESDC held a duly-noticed public hearing concerning the Project, in accordance with EDPL §§ 202 and 203. (Am. Compl. ¶ 84.) In addition, ESDC conducted community forums on September 12 and 18, 2006 and accepted written comments until September 29, 2006. (*Id.* ¶¶ 85-86; Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Complaint, dated Dec. 15, 2006 ("ESDC Mem."), at 8; Forest City Ratner Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint, dated Dec. 15, 2006 ("FCRC Mem.") at 4 n. 3.) A Final Environmental Impact Statement was certified as complete on November 27, 2006. *See* www.empire.state.ny.us/AtlanticYards/FEIS (last checked Feb. 6, 2007). Pursuant to EDPL § 204(A), ESDC published its

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between December 2003 and October 2006 is "squarely attributable to defendants['] own conduct." (Am. Compl. ¶¶ 98, 106.)

[13] Under the UDC Act, the ESDC may only condemn property for a land use development project if it determines "[t]hat the area in which the project is to be located is a substandard or insanitary area, or is in danger of becoming a substandard or insanitary area and tends to impair or arrest the sound growth and development of the municipality." N.Y. UNCONSOL. LAWS § 6260(c)(1).

Determination and Findings on December 8, 2006. In its Determination and Findings, ESDC confirmed that it intends to exercise its eminent domain power to acquire private properties within the Project site. (Kraus Decl., Ex. E; ESDC Mem. at 7-8.) On December 20, 2006, the Public Authorities Control Board, which has the power and duty to "receive applications for approval of the financing and construction of any project proposed by [certain specified] state public benefit corporations" (N.Y. PUB. AUTH. L., Art. 1-A, §§ 50, 51), approved the Project.

On January 11, 2007, a separate group of plaintiffs filed a petition in the New York Appellate Division, Second Department, pursuant to EDPL § 207(B).[14] The exclusive 30-day period in which the ESDC's Determination and Findings may be appealed in the Appellate Division has now passed.[15] ESDC has yet to file an Article 4 proceeding seeking transfer of title to plaintiffs' properties.

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[14] The plaintiffs in that action, entitled *Anderson v. New York State Urban Development Corporation,* are all rent-stabilized tenants in two buildings owned by FCRC. Their petition seeks, *inter alia,* a judgment rejecting the ESDC's Determination and Findings, pursuant to EDPL § 207" with respect to the acquisition of 624 Pacific Street and 473 Dean Street, Brooklyn, New York, in furtherance of the Atlantic Yards Arena and Redevelopment Project." (*See* Declaration of Douglas M. Kraus, Esq., dated Jan. 19, 2007, Ex. A.)

[15] The parties disagree as to whether the 30-day period for appeal under EDPL § 207(B) is subject to tolling under 28 U.S.C. § 1367(d). That issue is not presently before the court.

DISCUSSION

A. *Standard for Motion to Dismiss under Rule 12(b)(1)*

Defendants move to dismiss plaintiffs' complaint for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994); *see also Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (federal courts are "courts of limited jurisdiction" whose powers are confined to statutorily and constitutionally granted authority); *Gen. Motors Corp. v. EPA*, 363 F.3d 442, 448 (D.C. Cir. 2004) (noting that "[a]s a court of limited jurisdiction, we begin, and end, with an examination of our jurisdiction."). Because subject matter jurisdiction is an Article III requirement, "no action of the parties can confer subject-matter jurisdiction upon a federal court.'" *Hoeft v. MVL Grp., Inc.*, 343 F.3d 57, 66 (2d Cir. 2003) (quoting *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982)).

On a motion to dismiss under Rule 12(b)(1), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Gilman v. BHC Sec.*, 104 F.3d 1418, 1421 (2d Cir. 1997). However, the court may dismiss a complaint for lack of subject matter jurisdiction only if "'it appears beyond doubt that the

plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Commodity Futures Trading Comm'n v. Int'l Foreign Currency, Inc.*, 334 F. Supp. 2d 305, 309 (E.D.N.Y. 2004) (quoting *Fortress Bible Church v. Feiner*, No. 03-4235, 2004 WL 1179307, at *1 (S.D.N.Y. Mar. 29, 2004)). Because subject matter jurisdiction focuses on the court's power to hear the claim, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1149, 124 S.Ct. 1146, 157 L.Ed.2d 1042 (2004); *Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C.2001). Moreover, the court is not limited to the allegations in the complaint; instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *Kamen v. American Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986).

B. *Ripeness*

Defendants urge this court to dismiss the complaint for lack of subject matter jurisdiction on the ground that it is not ripe for judicial review. They argue that plaintiffs' claims will not be ripe for review until condemnation proceedings are commenced pursuant to EDPL Article 4. It is axiomatic that federal courts may adjudicate only those "real and substantial controvers[ies] admitting of specific relief . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis v.*

Continental Bank Corp., 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Thus, ripeness is a constitutional prerequisite to the exercise of federal jurisdiction. *See Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 225 (2d Cir. 1998).

"The ripeness doctrine's basic rationale is to prevent the courts through avoidance of premature adjudication from entangling themselves in abstract disagreements." *Woodfield Equities, LLC v. Inc. Vill. of Patchogue*, 357 F. Supp. 2d 622, 632 (E.D.N.Y.) (internal quotation marks and citation omitted), *aff'd*, 156 Fed. Appx. 389 (2d Cir. 2005). The ripeness doctrine asks "whether the case has been brought at a point so early that it is not yet clear whether a real dispute to be resolved exists between the parties." 15 JAMES WM. MOORE ET AL., MOORE'S FED. PRAC. § 101.70[2] (3d ed. 1997). Because ripeness is jurisdictional and stems from the Article III requirement that federal courts hear only cases or controversies, the court is obliged to consider the ripeness question before reaching the merits of plaintiffs' claims. *See Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n. 18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993) (explaining that "[the] ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction."); *Vandor v. Militello*, 301 F.3d 37, 38 (2d Cir. 2002) ("We are obliged to consider the ripeness question before reaching the merits of [the plaintiff's] claims because ripeness is jurisdictional."); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 84, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (instructing federal courts to resolve questions of Article III jurisdiction before reaching the merits of a

plaintiff's claim).[16] Moreover, because ripeness is a jurisdictional inquiry, the court "must presume that [it] cannot entertain [plaintiffs'] claims 'unless the contrary appears affirmatively from the record.'" *Murphy v. New Milford Zoning Comm'n,* 402 F.3d 342, 347 (2d Cir. 2005) (quoting *Renne v. Geary,* 501 U.S. 312, 316, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991)).

To measure ripeness, the court must look to: (1) whether the controversy is fit for judicial adjudication; and (2) the hardship to the parties of withholding court consideration. *Abbott Labs. v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). In essence, this approach balances the need for decision against the risks of decision: "[t]he need to decide is a function of the probability and importance of the anticipated injury," whereas "[t]he risks of decision are measured by the difficulty and sensitivity of the issues presented, and by the need for further factual development to aid decision." Charles Alan Wright, Arthur R. Miller and Edward H. Cooper, 13A FEDERAL PRACTICE AND PROCEDURE § 3532.1 (2006). With respect to the first prong, the central inquiry is whether the court would

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[16] As defendants correctly note, the Second Circuit has held that a federal court may decide to abstain without addressing Article III limitations on jurisdiction. *See Spargo v. N.Y. State Comm'n on Judicial Conduct,* 351 F.3d 65, 74 (2d Cir. 2003) (explaining that, although federal courts may not exercise hypothetical jurisdiction to dismiss claims on the merits, they have flexibility "'to choose among threshold grounds' for disposing of a case without reaching the merits.") (quoting *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 585, 119 S.Ct. 1563, 143 L.Ed.2d 760 (1999)). In the interest of making a thorough Report and Recommendation on defendants' motions, I will address the issue of ripeness.

benefit from deferring initial review until the claims it is called on to consider "have arisen in a more concrete and final form." *Murphy,* 402 F.3d at 347. If a claim rests upon contingent future events that may not occur as anticipated, or may not occur at all, it is not ripe for adjudication. *Auerbach v. Bd. of Educ.,* 136 F.3d 104, 108-09 (2d Cir. 1998); *see also In re Drexel Burnham Lambert Grp., Inc.,* 995 F.2d 1138, 1146 (2d Cir. 1993) (stating that adjudication is inappropriate where there is "no certainty" that the complained-of action will occur). On the other hand, the "hardship to the parties" prong "injects prudential considerations into the mix," requiring the court to "gauge the risk and severity of injury to a party that will result if the exercise of jurisdiction is declined." *Murphy,* 402 F.3d at 347.

In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194-95, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), the Supreme Court established a two-pronged test for analyzing ripeness of claims under the Fifth Amendment's Takings Clause. *Williamson County* involved a landowner's claim in federal district court for money damages suffered when the planning commission allegedly took the landowner's property in the course of applying local land use regulations. *Id.* at 175. The Sixth Circuit upheld a jury award of money damages to the landowner (*Williamson County Reg'l Planning Comm'n v. Hamilton Bank,* 729 F.2d 402, 409 (6th Cir. 1984)), but the Supreme Court found the landowner's claim unripe on two grounds. First, the Court held that a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."

Williamson County, 473 U.S. at 186. A "final decision" is a "definitive position on the issue that inflicts an actual, concrete injury." *Id.* at 193. In *Williamson County,* the Court found that the plaintiff developer had not yet obtained a final decision because it had failed to seek "variances that would have allowed it to develop the property according to its proposed plan." *Id.* at 188.

Second, the Court held that a takings claim is not ripe until the landowner has availed itself of the state's procedures for obtaining just compensation. *Id.* at 195. The Court noted that the state of Tennessee authorized landowners to bring "inverse condemnation" actions to obtain just compensation for alleged takings effected by restrictive zoning laws or development restrictions. *Id.* at 196. It held that the landowner "cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. "The second prong of the *Williamson* test applies to physical as well as regulatory takings," where the plaintiff alleges a violation of the just compensation clause. *RKO Delaware, Inc. v. City of N.Y.*, No. CV002592, 2001 WL 1329060, at *4 (E.D.N.Y. Aug. 30, 2001). *See also Pascoag Reservoir & Dam, LLC v. Rhode Island,* 337 F.3d 87, 92 (1st Cir. 2003) (applying the exhaustion exceptions of *Williamson County* to physical takings); *Villager Pond, Inc. v. Town of Darien,* 56 F.3d 375, 380 (2d Cir. 1995) ("'Even in physical taking cases, compensation must first be sought from the state if adequate procedures are available.'") (quoting *Sinaloa Lake Owners Ass'n v. City of Simi Valley,* 882 F.2d 1398, 1402 (9th Cir. 1989)). Thus, *Williamson County* stands for the general proposition that, subject to

limited exceptions,[17] a landowner cannot prevail on a just compensation claim in federal court until it has failed in its effort to obtain relief through the state courts.[18]

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[17] For example, if the federal government committed the alleged taking, the plaintiff would not have to proceed in state court. *See, e.g., Hodel v. Irving,* 481 U.S. 704, 711, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987). In addition, a facial attack on an ordinance need not comply with the finality rule. *See Suitum v. Tahoe Reg'l Planning Agency,* 520 U.S. 725, 736, 736 n. 10, 117 S.Ct. 1659, 137 L.Ed.2d 980 (1997) ("[F]acial challenges to regulation are generally ripe the moment the challenged regulation or ordinance is passed, but face an uphill battle, since it is difficult to demonstrate that mere enactment of a piece of legislation deprived [the owner] of economically viable use of [his] property.") (internal citations and quotations omitted)).

[18] The Second Circuit has noted that "[t]he ripeness requirement of *Williamson,* although announced in a takings context, has been extended to equal protection and due process claims asserted in the context of land use challenges."*Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 88 (2d Cir. 2002). *See also Murphy,* 402 F.3d at 349 (observing that *Williamson County's* ripeness requirement has been extended to equal protection and due process challenges to zoning decisions); *Southview Assocs., Ltd. v. Bongartz,* 980 F.2d 84, 96-97 (2d Cir. 1992) (applying ripeness requirement to substantive due process claims); *Kittay v. Giuliani,* 112 F. Supp. 2d 342, 349 & n. 5 (S.D.N.Y. 2000) ("the ripeness inquiry is the same for each of plaintiff's as-applied takings, due process, equal protection and First Amendment claims."), *aff'd,* 252 F.3d 645 (2d Cir. 2001). Inasmuch as plaintiff's takings, due process and equal protection claims arise out of the same factual events, the court will apply the same ripeness inquiry to all of plaintiffs' claims. *See Dougherty,* 282 F. 3d at 88-89, 92 n. 7; *Goldfine v. Kelly,* 80

The Supreme Court recently reaffirmed this holding in *San Remo Hotel, L.P. v. City & County of San Francisco,* 545 U.S. 323, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). In that case, the Court explained that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," and it confirmed the requirement that a landowner challenging a regulatory taking proceed-at least initially-in state court. *Id.* at 2507.[19]

F. Supp .2d 153, 158-59 (S.D.N.Y. 2000); *Kittay,* 112 F. Supp. 2d at 349 & n. 5.

[19] Of course, once a litigant's federal claims related to the merits of the taking are determined in state court, res judicata and collateral estoppel may operate to bar that litigant from bringing his or her claims in federal court. The Supreme Court recently explained in *San Remo* that permitting federal review of state court awards of just compensation for takings would deny full faith and credit to state court rulings in federal courts. *See San Remo,* 545 U.S. at 338 (stating that "Congress has not expressed any intent to exempt from the full faith and credit statute federal takings claims" and applying the "normal assumption that the weighty interests in finality and comity trump the interest in giving losing litigants access to an additional appellate tribunal"). Indeed, *San Remo* has been described as "in many ways the most significant" Supreme Court takings case from 2005, "because its combination of ripeness and preclusion doctrines appears to bar the door to federal court for virtually all federal takings claims" and because the Court in that case "emphatically rejected the notion that takings plaintiffs have a right to federal adjudication" Stewart E. Sterk, *The Demise of Federal Takings Litigation,* 48 WM. & MARY L.REV. 251, 253 (Oct. 2006). *See also* J. David Breemer, *You Can Check Out But You Can Never Leave: The Story*

Both *Williamson County* and *San Remo* arose in the regulatory takings context, where the plaintiffs were seeking just compensation for an alleged taking, and neither involved a challenge to a condemnation under the Fifth Amendment's public use clause. Because just compensation is not an issue in this case, the parties agree that *Williamson County's* framework is inapplicable here. (*See* ESDC Mem. at 13; Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss, dated Jan. 5, 2007, at 16.)

It is true, as plaintiffs argue, that no Supreme Court precedent directly forecloses the possibility of securing federal jurisdiction by seeking declaratory or injunctive relief under the public use clause, and courts in other circuits have declined to require public use plaintiffs to seek just compensation in state court. *See Theodorou v. Measel,* 53 Fed. Appx. 640, 643 (3d Cir. 2002) (holding that because "[s]tate takings of private property for private use are not permitted . . . with or without just compensation," a property owner "need not seek compensation for an alleged physical taking for private use through a state procedure in order to ripen [his or her] claim."); *Montgomery v. Carter County,* 226 F.3d 758, 770-71 (6th Cir. 2000) (takings case held ripe where property owner's driveway had been classified as a public road; state eminent domain proceedings "would not supply the

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of San Remo Hotel-The Supreme Court Relegates Federal Takings Claims to State Courts Under a Rule Intended to Ripen the Claims for Federal Review, 33 B.C. ENVTL. AFF. L. REV. 247, 250 (2006) (criticizing the Supreme Court's decision in *San Remo* as banishing takings claims to state courts).

appropriate remedy" because plaintiff was not seeking just compensation); *Armendariz v. Penman,* 75 F.3d 1311, 1320-21 and n. 5 (9th Cir. 1996) (en banc) ("Because a 'private taking' cannot be constitutional even if compensated, a plaintiff alleging such a taking would not need to seek compensation in state proceedings before filing a federal takings claim under the rule of *Williamson County*"); *Samaad v. City of Dallas,* 940 F.2d 925, 936-37 (5th Cir. 1991) (holding that "a taking for a private purpose is unconstitutional even if the government provides just compensation," but concluding that noise from automobile racing at nearby fairground did not constitute a taking).

However, the instant case is factually distinguishable in that, at this moment in time, there has been no taking of plaintiffs' property. In each of these cases, in which a public use claim was deemed ripe, the alleged taking had already occurred. Thus, even assuming plaintiffs are not required to seek just compensation in state court in order to ripen their claims,[20] the question remains as to when a public use

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[20] It bears noting that the courts are not unanimous on this point. The Seventh Circuit, for example, "has consistently maintained a strict requirement that Takings Clause litigants must first take their claim to state court even when plaintiffs . . . are alleging a taking for private purpose." *Daniels v. Area Plan Comm'n,* 306 F.3d 445, 453 (7th Cir. 2002) (citing *Forseth v. Vill. of Sussex,* 199 F.3d 363, 370 (7th Cir. 2000); *Covington Court Ltd. v. Vill. of Oak Brook,* 77 F.3d 177, 179 (7th Cir. 1996); and *Gamble v. Eau Claire County,* 5 F.3d 285, 288 (7th Cir. 1993)) (finding that the plaintiffs' claim satisfied the futility exception to *Williamson County's* ripeness requirement, and therefore declining to resolve

claim relating to a planned condemnation is ripe for adjudication.

The parties have cited no case in this circuit, and the court's independent research uncovered none, explaining precisely when a public use claim is ripe for adjudication. However, *Port Chester Yacht Club, Inc. v. Iasillo,* 614 F. Supp. 318 (S.D.N.Y. 1985), is instructive. In that case the court explained that, in order to support a claim of an unconstitutional taking in violation of the Fourteenth Amendment and § 1983, a plaintiff must establish three elements: "(1) a property interest, (2) that has been taken under the color of state law, (3) without due process or just compensation." *Id.* at 321 (citing *Parratt v. Taylor,* 451 U.S. 572, 535-37 (1981); *Kohlasch v. N.Y. State Thruway Auth.,* 460 F. Supp. 956, 960 (S.D.N.Y. 1978)). The plaintiffs in *Port Chester* challenged an urban redevelopment plan, which was slated to involve the use of eminent domain, on the ground that the planned taking was for private use. The court noted that the plaintiffs were not required to "wait until they are physically evicted before they can claim that they have been deprived of their property without due process of law," but stated that to establish a constitutional violation, a condemnee challenging a taking must show evidence of "'physical entry by the condemnor [or], a physical ouster of the owner [or], a legal interference with the physical use, possession or enjoyment of the property or a legal interference with the owner's power of disposition of the property.'" *Id.* at

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the tension between the Seventh Circuit's and other circuits' readings of *Williamson County*).

321 n. 5 (quoting *City of Buffalo v. J.W. Clement Co.*, 28 N.Y.2d 241, 321 N.Y.S.2d 345, 269 N.E.2d 895, 903 (N.Y. 1971)). Plainly stated, "[t]he simple approval of a redevelopment plan can not be considered a deprivation of [a prospective condemnee's] constitutional rights" because "[o]nly when an individual has been deprived of property without due process of law has he been injured in a constitutional sense." *Id.* at 321, 321 N.Y.S.2d 345, 269 N.E.2d 895. The court therefore dismissed the plaintiff's § 1983 claim, directing it to "take advantage of the adequate state procedures" available to it. *Id.* at 322, 321 N.Y.S.2d 345, 269 N.E.2d 895. Although, as plaintiffs emphasize, the language of *Port Chester Yacht Club* focuses almost entirely on the plaintiff's due process claim, it is clear from the opinion that the plaintiff in that case was also seeking injunctive relief under the Fifth Amendment's Public Use Clause, and that the court dismissed that claim on ripeness grounds for failure to pursue available state remedies. *Id.* at 319, 321.

Other decisions demonstrate that federal courts are reticent to adjudicate public use claims until the taking is final. *See, e.g., Wendy's Int'l, Inc. v. City of Birmingham,* 868 F.2d 433, 436 (11th Cir. 1989) (public use claims held unripe because the likelihood that the plaintiffs' property would be confiscated had "not yet matured into a credible certainty;" since the redevelopment plan at issue obligated the developer to attempt to reach negotiated settlements with property owners, the threat of condemnation "simply [wa]s too attenuated to stir up an actual controversy."); *Frempong-Atuahene v. Redevelopment Auth. of City of Philadelphia,* No. 98-0285, 1999 WL 167726, at *3

(E.D. Pa. Mar. 25, 1999) (because plaintiff's public use claims could be vindicated by a favorable outcome in a pending state court action, plaintiff's federal claims were not ripe for federal review), *aff'd mem.*, 211 F.3d 1261 (3d Cir. 2000); *Hemperly v. Crumpton*, 708 F. Supp. 1247, 1250 (M.D. Ala. 1988) (public use claim held not ripe for disposition where state condemnation proceedings had not yet been initiated); *Eddystone Equipment and Rental Corp. v. Redevelopment Authority of Delaware County*, Civ. A. No. 87-8246, 1988 WL 52082, *2 (E.D. Pa. May 17, 1988) (citing *Williamson County* for the proposition that § 1983 claim challenging taking on public use grounds "would not be 'ripe' before the state court rendered final approval of the condemnation."), *aff'd mem.*, 862 F.2d 307 (3d Cir. 1988). *See also Hancich v. Gopoian*, 815 F.2d 883, 884 (2d Cir. 1987) (issue of whether decrease in mobile home's resale value due to eviction from lot would constitute a taking of plaintiff's property without due process held premature where no eviction order had yet been entered in state court); *Woodfield Equities, L.L.C.*, 357 F. Supp. 2d at 632 (holding that Village's decision to condemn the property at issue was not "a final action" because the condemnation still be had to be approved by the Appellate Division under EDPL § 207). These holdings are consistent with general ripeness jurisprudence. As explained above, when the events alleged in a plaintiff's cause of action have not yet occurred or are not certain to occur, a federal court is precluded from exercising subject matter jurisdiction because a real case or controversy does not exist for purposes of Article III. *See Auerbach*, 136 F.3d at 108.

In opposition, plaintiffs cite *Rosenthal & Rosenthal Inc. v. N.Y. State Urban Dev. Corp.*, 605 F. Supp. 612 (S.D.N.Y. 1985), *aff'd*, 771 F.2d 44 (2d Cir. 1985) (per curiam), and *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), in which the courts dismissed public use claims on the merits, with little or no discussion of the ripeness issue. In *Rosenthal & Rosenthal*, the court found-with scant analysis-that the plaintiffs' suit to enjoin condemnation of their properties was ripe for review because the redevelopment project at issue had been approved by the Board of Estimate, the ESDC had published its Determination and Findings, and the condemnation was "imminent," notwithstanding potential delays due to the pendency of state proceedings challenging the project, which had been filed after commencement of the federal action. *Id.* at 614-15. Explaining that "[t]he federal courts remain available for challenges to truly private or truly irrational takings,"[21] the court proceeded to dismiss the case for failure to state a cause of action, holding that the plaintiffs could not demonstrate that no public purpose existed for the project. *Id.* at 619.

In *Midkiff*, the plaintiffs challenged the constitutionality of the Hawaii Land Reform Act, which allowed the State to use the power of eminent domain to condemn certain residential land and then sell it to the residential lessees. *See Midkiff v. Tom*,

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[21] The court in *Rosenthal & Rosenthal* gave short shrift to the defendants' abstention argument, stating simply that it saw "no need to abstain in deference to possible state proceedings filed after the commencement of this action." 605 F. Supp. at 615.

483 F. Supp. 62 (D. Haw. 1979). The plaintiffs brought suit under the Fifth Amendment's public use clause, and the district court framed the issue as "limited in scope to the question of whether the plaintiffs were denied substantive due process." *Id.* at 65. Explaining that the court's only inquiry was to determine whether the statute furthered "the health, safety, morals, or general welfare of the people of Hawaii," and whether "the means chosen to accomplish that object are rational and not in bad faith," the court found the law constitutional on its face as "within reach of the police power." *Id.* at 67. At the time *Midkiff* was filed in federal district court, no condemnation actions had yet been filed in the state courts. *See Midkiff v. Tom,* 702 F.2d 788, 789 n. 1 (9th Cir. 1983). Nonetheless, no party raised the issue of ripeness and the court did not consider that issue.[22]

These cases, as well as the others cited in plaintiffs' brief, confirm the principle that the pertinent question for ripeness purposes is whether the challenged condemnation is final, imminent, or inevitable. In *Midkiff,* although condemnation proceedings had not been commenced, the state had made the statutorily required finding that the acquisition of the lands in question would further the statute's public purposes and had ordered the landowners to submit to

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[22] The Ninth Circuit reversed, holding that the Hawaii Land Reform Act violated the public use clause (*see* 702 F.2d at 798), and the Supreme Court reversed that decision, concluding that the statute did not violate the Fifth Amendment's public use requirement. *See Hawaii Housing Auth. v. Midkiff,* 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Again, neither court addressed the issue of ripeness.

compulsory arbitration with their lessees for the purpose of determining the prices at which the properties would be sold. *Id.* at 234. Thus, under Hawaii's law, it was inevitable that the landowners eventually would be forced to surrender their property. Likewise, the court in *Rosenthal & Rosenthal* characterized the condemnations at issue in that case as "imminent." 605 F. Supp. at 615. *See also Berman v. Parker,* 348 U.S. 26, 28-30, 75 S.Ct. 98, 99 L.Ed. 27 (1954) (upholding constitutionality of the District of Columbia Redevelopment Act of 1945, which was authorized by Congress to eliminate blight, prior to the commencement of condemnation proceedings without addressing ripeness issue); *Aaron v. Target Corp.*, 269 F. Supp. 2d 1162, 1176 (E.D. Mo. 2003) (granting temporary restraining order enjoining state condemnation proceedings and holding that public use claim was ripe for review because the pending state court action represented "a manifest and palpable threat that the Properties will be taken in violation of the Public Use Clause of the Fifth and Fourteenth Amendments."), *rev'd on Younger abstention grounds,* 357 F.3d 768 (8th Cir. 2004); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency,* 218 F. Supp. 2d 1203, 1215-16 (C.D. Ca. 2002) (granting church's motion for preliminary injunction against city's condemnation proceedings, where injunction was authorized under the Religious Land Use and Institutionalized Persons Act and plaintiff had already been denied a conditional use permit for church facility construction); *99 Cents Only Stores v. Lancaster Dev. Agency,* 237 F. Supp. 2d 1123, 1127 (C.D. Ca. 2001) (granting preliminary injunction to enjoin a threatened taking under a city ordinance authorizing condemnation, even though no condemnation

proceeding had begun, where there was a "reasonable likelihood" that the municipality would initiate condemnation proceedings in the future), *appeal dismissed on mootness grounds,* 60 Fed. Appx. 123 (9th Cir. 2003).[23]

As all of the above cases reveal, however, the notion of "finality" or "imminence" in this context is amorphous, open to interpretation, and at any rate highly fact-specific. Indeed, two cases decided the same year by different judges on the same court–*Rosenthal & Rosenthal* and *Port Chester Yacht Club*-reached seemingly contradictory conclusions in similar factual scenarios. This court's research uncovered no opinion from any jurisdiction citing to both of these cases. Moreover, as the court stressed in *Didden v. Village of Port Chester,* 304 F. Supp.2d 548, 569 (S.D.N.Y. 2004), local eminent domain procedures differ materially among jurisdictions; as a result, cases from other jurisdictions have limited precedential value.

It is against this backdrop of conflicting and frequently opaque authority that this court must determine whether the condemnations at issue in this case are sufficiently final or imminent to satisfy Article

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[23] In *99 Cents Only Stores,* the municipality later denied any intention to reinitiate condemnation proceedings and in fact took significant affirmative and irreversible steps toward the implementation of an alternate plan. 60 Fed. Appx. at 125.The Ninth Circuit therefore dismissed the appeal as moot. *Id.* It is impossible to know whether the district court's injunction was the motivating factor behind the municipality's decision to abandon its initial plan, or whether the condemnation would never have taken place in any event.

III's ripeness requirement. However, a separate line of cases, briefly mentioned by plaintiffs and discussed at oral argument, enters into the equation. In *Didden,* 304 F. Supp. 2d 548, the plaintiff landowners sought injunctive relief staying a condemnation proceeding that the Village of Port Chester had commenced in 2003 in connection with a large-scale redevelopment project. The court found the plaintiffs' § 1983 claims barred by the applicable three-year statute of limitations. It explained that federal law dictates when a federal cause of action accrues and that "a cause of action under 42 U.S.C. § 1983 accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.* at 558. The court determined that the plaintiffs "had reason to know of the basis of their injury as soon as the [Port Chester Board of Trustees] announced its public purpose finding [in July 1999]" and the Village authorized a land disposition agreement with the developer covering the use of eminent domain and finding a legitimate public purpose for condemnation as a means of acquiring property for the project. *Id.* The court rejected the plaintiffs' argument that they did not suffer an injury until four years later, when the developer allegedly attempted to exact a cash payment from them on threat of condemnation. *Id.* at 559. Instead, it found the plaintiffs' claims time-barred on the ground that they "were able to, and did in fact, contemplate Port Chester's actions in 1999." *Didden v. Vill. of Port Chester,* 322 F. Supp. 2d 385, 389 (S.D.N.Y. 2004) (dismissing amended complaint on same grounds), *aff'd,* 173 Fed. Appx. 931, 2006 WL 898093 (2d Cir. 2006), *cert. denied,* --- U.S. - - - - , 127 S.Ct. 1127, 166 L.Ed.2d 892, 2007 WL 91474 (Jan. 16, 2007). It stands to reason that if the plaintiffs' claims

accrued, for statute of limitations purposes, at the time of the government entity's public purpose finding, then their claims must have been ripe at that point.

Indeed, although ripeness was not an issue in *Didden,* courts often use the terms "ripeness" and "accrual" interchangeably. *See, e.g., W.J.F. Realty Corp. v. Town of Southampton,* 351 F. Supp. 2d 18, 23 (E.D.N.Y. 2004) (explaining, in a regulatory takings case, that "[a] claim under section 1983 is not ripe-and a cause of action under section 1983 does not accrue-until" the state denies just compensation.); *Williams v. Dow Chem. Co.,* No. 01 Civ. 4307, 2004 WL 1348932, at *7 (S.D.N.Y. June 16, 2004) ("Fully ripened claims having accrued more than three years prior to the institution of this suit, the section 349 and 350 claims [under the New York General Business Law] are barred by the statute of limitations."); *Argonaut P'ship, L.P. v. Bankers Trustee Co.,* No. 96 CIV. 1970, 96 CIV. 2222, 1997 WL 45521, at *5 (S.D.N.Y. Feb. 4, 1997) ("This action meets the first prong of the ripeness inquiry [under *Abbott Labs.* and its progeny]: it is now fit for review because plaintiffs' claim has accrued and its viability does not depend upon the occurrence of any contingent event."). This makes sense, as both inquiries center around the timing and significance of the plaintiff's injury. *See Pearl v. City of Long Beach,* 296 F.3d 76, 80 (2d Cir. 2002) (explaining that a claim accrues for statute of limitations purposes "when the plaintiff knows or has reason to know of the injury which is the basis of [her] action.") (internal quotation marks omitted); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals,* 282 F.3d 83, 90 (2d Cir. 2002) ("The purpose of the ripeness requirement is to ensure that a dispute has generated injury significant enough

to satisfy the case or controversy requirement of Article III of the U.S. Constitution.").

Assessing this case on its unique facts, as the court must, I find plaintiffs' injuries sufficiently concrete to be considered ripe for judicial review. To be sure, the ESDC cannot acquire ownership of plaintiffs' properties until it has commenced an Article 4 proceeding in state court, and any number of things-foreseeable or not-could happen to derail the Project in the meantime.[24] However, under *Didden,* plaintiffs' claims accrued when the ESDC issued its final Determination and Findings of public use, benefit or purpose pursuant to EDPL § 204(B)(1). Although the Determination and Findings effects no immediate change in plaintiffs' ability to use their properties, defendants do not point to any further legal or administrative impediments to the condemnations at issue in this case.

The EDPL § 207 proceeding currently pending in state court cannot eliminate or lessen all of plaintiffs' injuries in this case, as the petitioners in the state case are non-condemnees and have narrowly tailored their petition to seek only rejection of the Determination and Findings "with respect to the acquisition of 624 Pacific

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[24] The ESDC defendants offer a few examples of development projects that stalled or were abandoned after the condemning authority issued its Determination and Findings. (*See* Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Amended Complaint, dated Jan. 19, 2007, at 14-15.) However, they do not suggest that there is any danger of the Atlantic Yards Project meeting a similar fate.

Street and 473 Dean Street Brooklyn"[25] and relocation into equivalent housing. On its face, the state petition does not challenge the condemnations on public use grounds. (*See* Declaration of Douglas M. Kraus, Esq., dated Jan. 19, 2007, Ex. A ¶ 3 (stating, "Petitioners believe that as non-condemnees, they lack standing in this proceeding to challenge the condemnation itself.")[26]

Little need be said about the second prong of the *Abbott Labs* test, *i.e.,* the potential hardship to plaintiffs. Clearly, the proposed condemnations, and the consequent dispossession of plaintiffs from their homes and businesses, pose a significant threat of harm.

In short, there is a real dispute between the parties. I therefore respectfully recommend that defendants' motions to dismiss this case for lack of ripeness be denied.

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[25] Only one of the named plaintiffs in the instant case, Joseph Pastore-a rent-controlled tenant who lives at 473 Dean Street-resides in one of the buildings at issue in the state case. (*See* Am. Compl. ¶ 20.)

[26] The petition does allege that the ESDC's exercise of eminent domain to facilitate the construction of "private roads" is unconstitutional (*see* Declaration of Douglas M. Kraus, Esq., dated Jan. 19, 2007, Ex. A ¶ 11), but it does not invoke the Fifth Amendment's public use clause explicitly. Since the preceding paragraph refers to the New York Constitution (specifically, Art. 1 § 7(c), regarding private roads and the right to a "jury of freeholders"), the petition does not appear to assert any claims under the federal constitution.

C. *Abstention*

In the alternative, defendants urge this court to abstain from exercising jurisdiction in this case, either under *Younger v. Harris,* 401 U.S. 37, 45 (1971), or *Burford v. Sun Oil Co.,* 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943). *Younger* established the principle that federal courts should not enjoin or interfere with ongoing state proceedings. *Burford,* on the other hand, requires a federal court to dismiss a case involving an area of traditional state power when the exercise of federal jurisdiction would have a disruptive effect on "state efforts to establish a coherent policy with respect to a matter of substantial public concern." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 814, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976).

Underlying both abstention doctrines is a concern for comity and federalism expressed in "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger,* 401 U.S. at 44. *See also Quackenbush v. Allstate Ins. Co.,* 517 U.S. 706, 728, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (explaining that a court's decision to abstain "must reflect 'principles of federalism and comity.'") (quoting *Growe v. Emison,* 507 U.S. 25, 32, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993)); *Spargo v. N .Y. State Comm'n on Judicial Conduct,* 351 F.3d 65, 74-75 (2d Cir. 2003) (noting that *Younger* abstention is a prudential limitation on the court's exercise of jurisdiction "grounded in equitable considerations of comity" and "serves the vital purpose of 'reaffirm[ing] the competence of the state courts,' and acknowledging the dignity of states as co-equal sovereigns in our

federal system.") (citing *Diamond "D" Constr. Corp. v. McGowan,* 282 F.3d 191, 197 (2d Cir. 2002)), *cert. denied,* 541 U .S. 1085; *Youell v. Exxon Corp.,* 48 F.3d 105, 108 (2d Cir.) (*Burford* and *Younger* "extricate the federal courts from situations where the assertion of jurisdiction would intrude into the state courts' proper domain."), *vacated on other grounds,* 516 U.S. 801, 116 S.Ct. 43, 133 L.Ed.2d 9 (1995). However, because "federal courts have a 'virtually unflagging' obligation to exercise the jurisdiction given them" (*Colorado River,* 424 U.S. at 817), abstention "is the narrow exception, not the rule." *Cecos Int'l, Inc. v. Jorling,* 895 F.2d 66, 70 (2d Cir. 1990) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 14, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)). *See also County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188, 79 S.Ct. 1060, 3 L.Ed.2d 1163 (1959) ("the doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.").

I am not persuaded that the *Younger* doctrine applies here. In *Middlesex County Ethics Commission v. Garden State Bar Association,* 457 U.S. 423, 432, 102 S.Ct. 2515, 73 L.Ed.2d 116 (1982), the Supreme Court established a three-part test for *Younger* abstention in non-criminal state proceedings: (1) whether the state proceedings constitute ongoing state judicial proceedings; (2) whether the state proceedings implicate important state interests; and (3) whether

state procedures are available that allow the plaintiffs to raise their federal claims in state court. If all three factors are satisfied, the district court should abstain from exercising federal jurisdiction unless the state proceeding was commenced in bad faith, was filed for the purpose of harassing the plaintiffs, or if other unusual circumstances warrant the court's intervention. *See id.* at 435. For *Younger* abstention, the key question is whether "there is an ongoing state proceeding involving an important state interest that provides the federal plaintiff with an adequate opportunity for judicial review of its federal . . . claims." *Temple of Lost Sheep Inc. v. Abrams,* 930 F.2d 178, 182 (2d Cir. 1991). Moreover, it is imperative that the ongoing state proceedings be "'judicial in nature.'" *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans,* 491 U.S. 350, 361, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989) ("*NOPSI*") (quoting *Middlesex County,* 457 U.S. at 433-34).*See also Marisol A. by Forbes v. Giuliani,* 929 F. Supp. 662, 688 (S.D.N.Y. 1996) ("[t]he existence of an ongoing state court proceeding is crucial to this inquiry.").

In the instant case, there is no pending state court proceeding in which plaintiffs will have the opportunity to present the federal claims raised in the instant complaint. Plaintiffs did not commence a § 207 proceeding in the Appellate Division and their time to do so has expired.[27]Although the ESDC has stated its

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[27] In addition, even if the present action is deemed to toll the limitations period for filing a § 207 claim in state court, it is well-settled that "whether the federal plaintiff has an 'opportunity' to have the issue addressed in state court for *Younger* purposes does

intention to commence an Article 4 proceeding to condemn the properties at the appropriate time, that future action does not justify a refusal to assume jurisdiction under *Younger*. *See Cecos Int'l, Inc.*, 895 F.2d at 72 ("A federal court need not stay its jurisdictional hand when there is no state action pending at the time the federal suit is filed, even if there is a substantial likelihood that a state proceeding will be instituted in the future to vindicate the state's interests.").

There is one ongoing state court proceeding contesting the ESDC's Determination and Findings with respect to two specific properties, but that proceeding will not necessarily address or resolve the claims plaintiffs assert in this matter, as the petitioners in the state case do not challenge the condemnations. (*See* Declaration of Douglas M. Kraus, Esq., dated Jan. 19, 2007, Ex. A.) In short, this court's consideration of plaintiffs' claims would not interfere directly with any pending state court proceedings.[28]

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not turn on whether the plaintiff could file a new complaint in state court that alleged [his or] her federal claims." *Habich v. City of Dearborn*, 331 F.3d 524, 531 (6th Cir. 2003).

[28] Defendants assert that the five stages of the EDPL constitute a single, unitary proceeding, the focus of which is to determine, through judicial means, whether the condemnor's decision should be validated as being in accordance with the law, and what compensation should be paid if a taking occurs. (ESDC Mem. at 23 (citing *Didden*, 304 F. Supp. 2d at 564).) They therefore argue that every stage of the EDPL is judicial in nature. Defendants' argument is misplaced. The EDPL is a single legislative scheme with sequential proceedings, some of which are judicial and some

Accordingly, the action currently pending in state court

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of which are not. As described above, the first judicial proceeding takes place if and when a prospective condemnee files a claim in the Appellate Division under EDPL § 207. Defendants have cited no case, and the court knows of none, that has extended *Younger* abstention doctrine to non-judicial proceedings such as a public hearing of the nature prescribed in EDPL § 201.

Didden is distinguishable because, at the time of the court's decision in that case, the state condemnation proceeding was at the Article 4 stage. *Didden,* 304 F. Supp. 2d at 565. There can be no doubt that an Article 4 proceeding is "judicial in nature" and that, had the district court not abstained, it would have interfered directly with "ongoing state judicial proceedings" in which the plaintiffs could, at an earlier stage, have raised their federal claims. In the instant case, by contrast, there is no state proceeding pending that can clearly be considered "judicial in nature" and in which plaintiffs will have the opportunity to assert their federal claims.

Defendants also cite *Spargo,* 351 F.3d 65, for the proposition that administrative proceedings that have "fact-finding" as their "primary mission" are as deserving of comity as pending state judicial proceedings. *Spargo* involved a First Amendment challenge to three New York rules of judicial conduct, where the plaintiff-an elected New York State judge-sought to enjoin pending disciplinary proceedings commenced by the New York State Commission on Judicial Conduct. The Second Circuit held that the district court should have abstained under *Younger,* because the disciplinary proceedings afforded adequate opportunity for the plaintiff to raise his constitutional claims before a "competent state tribunal." *Id.* at 73, 77 (citing *Middlesex County Ethics Comm'n,* 457 U.S. at 437). The Article 2 proceedings in this case are not analogous, as there is no proceeding currently pending before a court or tribunal in which the plaintiffs may have their federal claims addressed.

cannot trigger abstention under *Younger*.

> However, I do find *Burford* abstention appropriate in this case. Under *Burford:*
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> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar'; *or* (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

NOPSI, 491 U.S. at 361 (quoting *Colorado River,* 424 U.S. at 814) (emphasis added). *Burford* abstention "enables federal courts to refrain from becoming involved with state policymaking and enforcement procedures in complex areas which are primarily the state's concern." *Soc'y for Good Will to Retarded Children v. Cuomo,* 652 F. Supp. 515, 523 (E.D.N.Y. 1987). *See also Surowitz v. N.Y. City Employees' Ret. Sys.* 376 F. Supp. 369, 376 (S.D.N.Y. 1974) (*Burford* abstention "permits a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state of its own affairs.").

A decision to abstain under *Burford* must be "based on a careful consideration of the federal interests in retaining jurisdiction over the dispute" and ultimately

represents a determination "that the State's interests are paramount and that [the] dispute would best be adjudicated in a state forum." *Burford,* 319 U.S. at 327. As the Supreme Court explained in *Quackenbush,* 517 U.S. at 727-28, there is no "formulaic test for determining when dismissal under *Burford* is appropriate." Rather, the court must consider "the federal interests in retaining jurisdiction over the dispute" as well as "the competing concern for the 'independence of state action.'" *Id.* (quoting *Burford,* 319 U.S. at 334). "This equitable decision balances the strong federal interest in having certain classes of cases, and certain federal rights, adjudicated in federal court, against the State's interests in maintaining uniformity in the treatment of an essentially local problem." *Id.* (internal quotes and citations omitted). *See also NOPSI,* 491 U.S. at 363 (question under *Burford* is whether adjudication in federal court would "unduly intrude into the processes of state government or undermine the State's ability to maintain desired uniformity"). Where the state's interest in carrying out its domestic policy predominates, and proceedings in federal court "are likely to add nothing to, or even detract from, the state's well organized system of regulation and review," the district court may abstain "without finding, in addition, a state issue or unclarity in the pertinent state law." *Arnav Indus., Inc. v. Dreskin,* 551 F. Supp. 461, 463-64 (S.D.N.Y. 1982) (citing *BT Inv. Managers, Inc. v. Lewis,* 559 F.2d 950, 955 (5th Cir. 1977), *aff'd in part and vacated in part on other grounds,* 447 U.S. 27, 100 S.Ct. 2009, 64 L.Ed.2d 702 (1980)).

In determining whether to invoke *Burford* abstention, the Second Circuit has outlined a number

of factors to be considered, including "[1] the degree of specificity of the state regulatory scheme, [2] the necessity of discretionary interpretation of state statutes, and [3] whether the subject matter of the litigation is traditionally one of state concern." *Planned Parenthood of Dutchess-Ulster, Inc. v. Steinhaus,* 60 F.3d 122, 127 (2d Cir. 1995) (citing *Bethphage Lutheran Serv., Inc. v. Weicker,* 965 F.2d 1239, 1243 (2d Cir. 1992)). These three factors "should inform the deliberation of a court," but all three need not be satisfied. *Feiwus v. Genpar, Inc.,* 43 F. Supp. 2d 289, 295 (E.D.N.Y. 1999). Rather, "[u]nder *Burford* and its progeny, a finding that the case at bar implicates the first and *either* of the second or third factors" weighs in favor of "finding that the state ['s] interest in adjudicating the case in its own forum outweighs the federal interest in retaining jurisdiction." *Id.* (emphasis added).

Here, the first and third factors weigh in favor of abstention. First, New York's EDPL sets forth a highly specific and comprehensive mechanism for condemnees to challenge any aspect of a condemnation in a state-created system of administrative and judicial review. The statute itself recites that its purpose is "to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state." EDPL § 101. *See also Jackson,* 503 N.Y.S.2d 298, 494 N.E.2d at 436 (explaining that the EDPL "was enacted in 1977 to supplant a mosaic of more than 150 scattered provisions with a uniform procedure."). This court must respect the state's concern for rationalizing and centralizing its eminent domain laws. *See Rucci v. Cranberry Twp., Pa.,* 130 Fed. Appx. 572, 577, 2005 WL 1111764, at *5 (3d Cir.

2005) (explaining that eminent domain is a "distinctly state-law matter," as evidenced by Pennsylvania's "extensive Eminent Domain Code" which "supplies a complete and exclusive procedure and law to govern all condemnations of property for public purposes and the assessment of damages therefor . . . .") (internal quotes and citation omitted); *Coles v. City of Philadelphia*, 145 F. Supp. 2d 646, 652 (E.D. Pa. 2001) (abstaining under *Burford* where state statute declared that it was intended "to provide a complete and exclusive procedure and law to govern all condemnations of property for public purposes."), *aff'd*, 38 Fed. Appx. 829 (3d Cir. 2002).

Second, it is indisputable that eminent domain is traditionally a matter of local concern and that the state has a vital interest in establishing a coherent policy with respect to it. *See Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 26, 29, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959) (explaining that "'[t]he fundamental fact is that eminent domain is a prerogative of the state, which on the one hand, may be exercised in any way that the state thinks fit, and, on the other, may not be exercised except by an authority which the state confers'" and holding that federal courts should abstain from deciding eminent domain cases due to the need to maintain "harmonious federal-state relations in [ ] matter[s] close to the political interests of a State.") (quoting *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239, 257, 25 S.Ct. 251, 49 L.Ed. 462 (Holmes, J., dissenting)). *See also United States v. Certain Lands in City of Louisville, Jefferson County, Ky.*, 78 F.2d 684, 687 (6th Cir. 1935) ("[T]here is nothing in the Fourteenth Amendment to prevent a state from

exercising the power of eminent domain to carry into effect a public policy which, in the light of the needs and exigencies of the state, may be regarded as promotive of the public interest."). Indeed, courts have consistently viewed the exercise of eminent domain power as an issue in which the state has an overriding interest. *See Emeryville Redevelopment Agency v. Clear Channel Outdoor,* No. C 06-01279, 2006 WL 1390561, at *4-5 (N.D. Cal. May 22, 2006) (abstaining from condemnation case in order to avoid "needlessly interfer[ing]" with the state's regulatory scheme; case required the court "to balance the state's policy for protecting the environment with the state's interest in addressing the housing needs of its growing population," and "[c]omity requires that the federal courts allow the state courts to make such policy determinations."); *Mateo v. Phillips,* 361 F. Supp. 2d 328, 330 (S.D.N.Y. 2005) (dismissing case on *Younger* abstention grounds and noting that "all eminent domain proceedings . . . implicate important state interests."); *Frempong-Atuahene,* 1999 WL 167726, at *4 (stating, in condemnation case, that the "essentially local character of this dispute and the availability of constitutional remedies in state court argue strongly against federal intervention"); *Dickie v. City of Tomah,* 782 F. Supp. 370, 374 (N.D. Ill. 1991) (describing eminent domain as "a matter of uniquely local concern."); *Broadway 41st St. Realty Corp. v. N.Y. State Urban Dev. Corp.,* 733 F. Supp. 735, 742 (S.D.N.Y. 1990) (explaining, as part of *Younger* abstention inquiry, that "[d]ue to the sensitive nature of the state's power to condemn the land of its citizens, eminent domain has remained a local political issue."); *Dash v. Frech,* No. 88-C-5001, 1989 WL 75422, at *3 (N.D.Ill. June 20, 1989) (holding that the court was

"compelled by the principles of comity and federalism to abstain from interfering with the eminent domain proceedings which are uniquely a matter of local concern.")[29]

The Supreme Court echoed this view in *Kelo v. City of New London,* 545 U.S. 469, 125 S.Ct. 2655, 162 L.Ed.2d 439 (2005), in which it stressed the "strong

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[29] Plaintiffs' reliance on *Minnich v. Gargano,* No. 00 Civ. 7481, 2001 WL 46989 (S.D.N.Y. Jan. 18, 2001) is misplaced. In *Minnich,* the plaintiffs alleged that sections of the EDPL were unconstitutional under the Fourteenth Amendment's due process clause. Specifically, they argued that the EDPL (which has since been amended) was unconstitutional for failure to require personal notice of the public hearing, the Determination and Findings, and the property owner's right to appeal, and for failure to provide an adversarial hearing or a proper forum for the property owner to be heard. *Id.* at *6. Acknowledging that "the eminent domain power is traditionally an area of state concern," the district court declined to abstain under *Burford,* holding that "the issues of due process involved here are overriding issues of federal constitutional concern." *Id.* at *5. The instant case is distinguishable in that it presents no direct facial challenge to any provision of the EDPL. *See Dittmer v. County of Suffolk,* 146 F.3d 113, 117 (2d Cir. 1998) (*Burford* abstention not warranted in a facial challenge to the constitutionality of a state statute, which is the type of controversy "federal courts are particularly suited to adjudicate.").

At any rate, the Second Circuit vacated the preliminary injunction granted in *Minnich,* holding that plaintiff Brody did not suffer any actual or threatened injury and thus lacked standing to bring his claims. *Brody v. Vill. of Port Chester,* 261 F.3d 288, 290 (2d Cir. 2001). Accordingly, the Second Circuit had no reason to review the *Burford* abstention arguments.

theme of federalism" in the Court's takings jurisprudence, "emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." *Id.*, 125 S.Ct. at 2664 (citing *Hairston v. Danville & Western R.R. Co.*, 208 U.S. 598, 606-07, 28 S.Ct. 331, 52 L.Ed. 637 (1908)). *See also San Remo*, 125 S.Ct. at 2507 (noting that "state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.")[30]

Plaintiffs have good reasons for preferring federal court over state court, not the least of which is the lack of access to discovery in state court proceedings under the EDPL.[31] As defendants point out, allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power. No prospective condemnee, given the choice, would opt for narrow, on-the-record (yet constitutionally adequate) review in the Appellate

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[30] At oral argument, plaintiffs' counsel all but conceded this point. (*See* Tr. at 37 ("The third factor is, you know, certainly a factor that militates towards the defendant[s'] argument .."))

[31] As one court has explained, "under the EDPL, the [condemning authority] holds nearly all the cards, with any aggrieved party having little right to participate in the initial determination and limited right to judicial review thereafter." *Buffalo S.R.R. Inc. v. Vill. of Croton-on-Hudson*, 434 F. Supp. 2d 241, 254 (S.D.N.Y. 2006) (citing *Brody*, 434 F.3d at 132-33).

Division if all of the benefits of federal review were freely available.[32]

The fact that plaintiffs have chosen not to commence an EDPL § 207 proceeding in the Appellate Division is of no moment, since "the lack of a pending state court action creates no preclusion of [*Burford*] abstention." *Coles v. Street,* 38 Fed. Appx. 829, 831 (3d Cir. 2002) (citing *Eddystone Equip. and Rental Corp.,* 1988 WL 52082, at *1). *See also Stoe v. Flaherty,* 436 F.3d 209, 213 (3d Cir. 2006) ("the existence of an ongoing state proceeding is not inherent in the nature of abstention. *Burford, Pullman,* and *Thibodaux* abstention, as well as other forms of abstention, apply without regard to the existence of an ongoing proceeding.") To the contrary, *Burford* abstention "is appropriate [where] state review is *available.*" *Coles,* 38 Fed. Appx. at 831 (emphasis added). Plaintiffs do not deny that state court review was available to them. In fact, plaintiffs confidently assert that state court review will remain available to them, under the tolling provision of 28 U.S.C. § 1367(d), if this court dismisses their claims. Nor do plaintiffs argue that the state courts are incompetent to decide their federal constitutional claims.

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[32] As a matter of public policy, the availability of discovery could reasonably be expected to promote a full and robust public debate and enhance the likelihood of rational decision-making. However, the constitutionality of the EDPL is not in question in this litigation, and it is not the place of the federal courts to determine public policy in areas of state and local concern such as eminent domain.

In *Didden*, 304 F. Supp. 2d 548, the court held that the plaintiffs had waived their right to challenge the public purpose of the redevelopment project at issue by failing to bring their claims in state court within the exclusive thirty-day limit set forth in EDPL § 207. The court stated:

> Even if Plaintiffs could have made a showing of non-public use, it is too late for them to do so now. Port Chester issued its public purpose findings in July 1999. Under the EDPL, Plaintiffs and others were allowed thirty days to challenge the public purpose finding in state court. . . . Plaintiffs failed to do so. Plaintiffs do not (and cannot) allege that they failed to receive notice of Port Chester's declaration of public purpose. *To allow Plaintiffs to challenge the public purpose of the Redevelopment Project now would contradict the express provisions of the EDPL, and undermine New York's constitutional unitary scheme for the condemnation of property.*

Id. at 560 (emphasis added). *Didden* is correct on this point; as the Second Circuit has explained, "'[a] claimant cannot be permitted to let the time for seeking a state remedy pass without doing anything to obtain it and then proceed in federal court on the basis that no state remedies are open.'" *Vandor, Inc.*, 301 F.3d at 39 (quoting *Gamble v. Eau Claire Co.*, 5 F.3d 285, 286 (7th Cir. 1993)).

Plaintiffs attempt to circumvent this problem by bringing a supplemental state law claim under EDPL

§ 207.[33] That effort is unavailing. It is true that plaintiffs' EDPL claim forms part of the same case or controversy as plaintiffs' claim under the Fifth Amendment's public use clause. *See* 28 U.S.C. § 1367 (stating that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.") However, in light of my

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[33] As defendants point out, EDPL § 207 states that the "jurisdiction of the appellate division of the supreme court shall be exclusive." This would seem to strip the federal courts of jurisdiction over the state law claim. *See Town of Haverstraw v. Barreras*, 361 F. Supp. 2d 317, 319 (S.D.N.Y. 2005) ("challenges to condemnations under [Article 4 of the] EDPL are within the exclusive jurisdiction of New York state courts.") (citing EDPL §§ 207(B), 501(B); *Sun Co. v. City of Syracuse Indus. Dev. Agency*, 197 A.D.2d 912, 602 N.Y.S.2d 456, 457 (4th Dep't 1993)). However, as plaintiffs correctly assert and defendants acknowledge, state law cannot dictate whether or when a federal court may assert jurisdiction over a supplemental state law claim. (*See* Plaintiffs' Opposition to Defendants' Motion to Dismiss Supplemental EDPL Claims, dated Jan. 26, 2007, at 2 (citing cases); *see also* Memorandum of Law of ESDC Defendants in Support of Their Motion to Dismiss the Amended Complaint, dated Jan. 19, 2007, at 10 n. 6 (recognizing that "'there would be substantial doubt as to the constitutionality of a state law purporting to preclude . . . pendent jurisdiction over a state-created claim.'" (quoting *TBK Partners v. Western Union Corp.*, 675 F.2d 456, 460 n. 3 (2d Cir. 1982)). Moreover, as plaintiffs argue, this provision is more properly interpreted as making clear that claims under EDPL § 207 must be brought in the Appellate Division as opposed to New York Supreme Court or another state court.

recommendation that this court dismiss plaintiffs' federal claims on *Burford* abstention grounds, their supplemental state law claim may be dismissed under 28 U.S.C. § 1367(c)(3), which permits district courts to decline to exercise supplemental jurisdiction over a claim if it has "dismissed all claims over which it has original jurisdiction." Put another way, plaintiffs cannot avoid the consequences of *Burford* abstention by bootstrapping a § 207 claim onto their federal claims.

In short, this action presents important public policy concerns and is essentially local in nature. Because the state's interest in adjudicating this case in its own forum outweighs the federal interest in retaining jurisdiction, I respectfully recommend that this court abstain under *Burford* and dismiss plaintiffs' amended complaint without prejudice.

Plaintiffs' Amended Complaint raises serious and difficult questions regarding the exercise of eminent domain under emerging Supreme Court jurisprudence, many of which were explored in some detail at oral argument. However, in light of my recommendation that this court abstain, it would be inappropriate to address plaintiffs' claims on the merits.

CONCLUSION

For the foregoing reasons, I respectfully recommend that this action be dismissed on *Burford* abstention grounds without prejudice. Any objections to this Report and Recommendation must be filed with the Clerk of Court, with courtesy copies to Judge Garaufis and to my chambers, within ten (10) business days.

Failure to file objections within the specified time waives the right to appeal the district court's order. *See* 28 U.S.C. § 636(b)(1); Fed. R.Civ .P. 72, 6(a), 6(e).

Dated: Brooklyn, New York
February 23, 2007

Respectfully submitted,

/s/ _____
Robert M. Levy
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

06-CV-5827 (NGG)

[Filed January 5, 2007]

DANIEL GOLDSTEIN, JERRY CAMPBELL, as the putative administrator of the estate of OLIVER ST. CLAIR STEWART and in his individual capacity, THE GELIN GROUP, LLC, CHADDERTON'S BAR AND GRILL INC., d/b/a FREDDY'S BAR AND BACKROOM, MARIA GONZALEZ, JACKIE GONZALEZ, YESENIA GONZALEZ, HUDA MUFLEH-ODEH, JAN AKHTAR, DAVID SHEETS, JOSEPH PASTORE, PETER WILLIAMS, PETER WILLIAMS ENTERPRISES, INC., HENRY WEINSTEIN, 535 CARLETON AVE. REALTY CORP., 535 CARLTON AVE. REALTY CORP., and PACIFIC CARLTON DEVELOPMENT CORP.,
Plaintiffs,

-against-

GEORGE E. PATAKI, CHARLES A. GARGANO, NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a

EMPIRE STATE DEVELOPMENT)
CORPORATION, BRUCE C. RATNER,)
JAMES P. STUCKEY, FOREST CITY)
ENTERPRISES, INC., FOREST CITY)
RATNER COMPANY, RATNER GROUP, INC.,)
BR FCRC, LLC, BR LAND, LLC FCR LAND,)
LLC, BROOKLYN ARENA, LLC, ATLANTIC)
YARDS DEVELOPMENT COMPANY, LLC,)
MICHAEL BLOOMBERG, DANIEL)
DOCTOROFF, ANDREW M. ALPER, JOSHUA)
SIREFMAN, CITY OF NEW YORK and)
NEW YORK CITY ECONOMIC)
DEVELOPMENT CORPORATION ,)
Defendants.)
)

AMENDED COMPLAINT

Plaintiffs, by their attorneys, for their Amended Complaint allege, upon knowledge as to themselves and otherwise upon information and belief, as follows:

PRELIMINARY STATEMENT

1. This action seeks to enjoin the unconstitutional exercise of the power of eminent domain to seize plaintiffs' private properties and transfer them to an influential private developer. This conduct by officials of the State of New York, acting in concert with local officials and the private developer, violates plaintiffs' rights, privileges, and immunities under the United States Constitution, as amended, specifically the Takings, Equal Protection and Due Process Clauses in the Fifth and Fourteenth Amendments.

2. This is a case about a conscious effort to circumvent community input and the lawful processes of open government; about the misuse of government's power to take property by eminent domain; and, ultimately, about a betrayal of public trust in service of the interests of a private developer. At the behest of defendant developer Bruce Ratner, defendants Governor Pataki and Mayor Bloomberg have agreed to allow Ratner and his companies to build the single largest multi-use real estate development in the history of the City of New York in the heart of Central Brooklyn (the "Project").[1] This deal was struck without first creating a comprehensive development plan or so much as considering a single alternative to Ratner's plan for development of the area, without a true competitive bidding process, and without a process to allow for meaningful community input. In the process, defendants, acting in concert, will seize over 120 tax lots of private property – plaintiffs' property – for the

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[1] The Project is known as the Atlantic Yards Arena and Redevelopment Project (the "Project"). As currently proposed, it is a publicly subsidized, mixed-use redevelopment project that would cover 22 acres of land in and around the Metropolitan Transportation Authority's (the "MTA"'s) Vanderbilt Yards, including the active rail yard, bus depot, city streets, two city properties and 68 other privately owned parcels totaling 123 tax lots. It includes a sports arena accommodating up to 20,500 persons; 16 high-rise apartment and office towers – ranging from approximately 18 to 60 stories – and containing 8.8 million square feet of residential, office and commercial space; and a 180-room hotel. The proposed project extends over 22 acres and is comprised of 6,860 housing units and approximately 600,000 square feet of office space. At least 4,610 of the housing units would be market rate.

benefit of the private developer who conceived this scheme and whose interest is to maximize his company's profits.

3. The exercise of eminent domain to seize plaintiffs' property in this case is not only unconstitutional; it is unnecessary. Development in this section of Brooklyn can be done successfully and profitably without taking a single piece of privately owned land. Defendants' decision to take plaintiffs' properties serves only one purpose: to allow Ratner to build a Project of unprecedented size, and thus to reap a profit that defendants, tellingly, have thus far refused to disclose. This is not merely favoritism of a particular developer in the classic sense – although it is that; here, the "favored" developer in fact is driving and dictating the process, with government officials at all levels obediently falling into line. This is precisely what the Fifth Amendment's Takings Clause forbids.

4. In order to meet the constitutional requirements of the Takings Clause, government may seize private property through the power of eminent domain *only* if the taking is for public use. The taking of plaintiffs' properties here violates that stricture because the Project itself was conceived by Ratner, and is being driven by his needs, motives, and vision, not those of the public at large. Far from emerging from a legitimate democratic process where the public interest is identified and articulated by its elected representatives, and the community at-large through mechanisms such as the City Charter-mandated Uniform Land Use Review Process, here the Project is the product of a developer's dream – and a conscious effort to bypass City procedures mandating meaningful

local review, planning, democratic oversight and community input. Far from an open process, the "review" and approval for this mammoth Project has been largely, if not solely, the province of the Empire State Development Corporation ("ESDC"), an entity wholly controlled by Pataki; *public* input and review has been a sham. The decision to approve the Project and the taking of plaintiffs' properties was made long ago.

5. Indeed, on On December 8, 2006, the ESDC issued a formal Determination and Findings in connection with the Project pursuant to Article 2 of the E.D.P.L. Through the Determination and Findings, the ESDC formally and finally determined that it should and will use its power of condemnation to acquire Plaintiffs' properties. In short order, plaintiffs' properties will be taken from them – absent the intervention of this Court. For the Fifth Amendment's "public use" requirement to be anything more than an empty incantation, defendants must be stopped.

PARTIES

Plaintiffs

6. Plaintiff Daniel Goldstein owns a condominium apartment located at 636 Pacific Street. Mr. Goldstein has owned and lived in the apartment since 2003 when the building opened to residents. Title to Mr. Goldstein's condominium will be seized by defendants to make way for the Project.

7. Plaintiff Jerry Campbell owns and lives in the residential property located at 495 Dean Street. The

estate of Mr. Campbell's grandfather, Oliver St. Clair Stewart, owns the residential property located at 493 Dean Street. Mr. Campbell is the putative administrator of his grandfather's estate. Mr. Campbell has one tenant. Mr. Campbell and/or members of Mr. Campbell's family have owned the two buildings for thirty-eight years. Title to the two properties will be seized by defendants to make way for the Project.

8. Plaintiff The Gelin Group LLC ("Gelin"), is a New York limited liability company that owns a one family residence located at 491 Dean Street. The Gelin Group's Managing Member, John Gelin and his wife, Ioana Sarbu, reside in the property which they recently renovated. Title to the property will be seized by defendants as part of the Project.

9. Plaintiff Chadderton's Bar and Grill Inc. d/b/a Freddy's Bar and Backroom ("Freddy's"), a New York corporation owns a seven-year commercial lease for the property located at 483-4855 Dean Street. The President of Freddy's is Frank Yost. Mr. Yost has owned the business for ten years. Freddy's (which dates back to the pre-prohibition era) was recently selected as one of Esquire Magazines Best Bars in America. Freddy's property rights, and thus its business, will be lost to make way for the Project.

10. Plaintiff Peter Williams Enterprises, Inc. ("Williams Inc.") is a New York corporation substantially owned and controlled by plaintiff Peter Williams ("Williams"). Williams Inc. owns a house located at 38 6th Avenue. In addition, Williams Inc. and Williams own an easement preventing building

outside of the current zoning envelope of the abutting property, 24 6th Avenue. Title to 38 6th Avenue will be seized by defendants as part of the Project.

11. Plaintiff 535 Carleton Ave. Realty Corp. or 535 Carlton Ave. Realty Corp. (collectively "535 Carlton") is a New York corporation substantially owned and controlled by plaintiff Henry Weinstein. 535 Carlton owns properties located at 547 Carlton Avenue (Block 1129, Lot 4) and at 533-543 Carlton Avenue (Block 1129, Lots 5 and Lot 6). Title to these properties will be seized by defendants as part of the Project.

12. Plaintiff Pacific Carlton Development Corp. ("Pacific") is New York corporation substantially owned and controlled by Weinstein. Pacific owns property located at 740-766 Pacific St. (Block 1129, Lot 13). Title to this property will be seized by defendants as part of the Project.

13. Plaintiffs Goldstein, Campbell, the estate of Oliver St. Clair Stewart, Gelin, Freddy's, Williams Inc., Williams, 535 Carlton, Weinstein, and Pacific are collectively referred to as the "Real Property Plaintiffs."

14. Plaintiff Maria Gonzalez is a rent-stabilized tenant who lives at 812 Pacific Street, Apartment 1L, Brooklyn, NY 11217 together with her husband and son. She has lived in the building for the past 33 years and Mr. Gonzalez has acted as the superintendent for the same number of years. Ms. Gonzalez and her husband currently hold an unexpired rent-stabilized lease which, but for the use of eminent domain, would be renewable upon its expiration in November 2008.

15. Plaintiff Jackie Gonzalez is a rent-stabilized tenant who lives at 812 Pacific Street, Apartment 3L, Brooklyn, NY 11217 together with her spouse and two minor children, aged three and five years old. She has lived in the building for the past two and a half years. Ms. Gonzalez currently holds an unexpired rent-stabilized lease which, but for the use of eminent domain, would be renewable upon its expiration in October 2007.

16. Plaintiff Yesenia Gonzalez is a rent-stabilized tenant who lives at 812 Pacific Street, Apartment 4L, Brooklyn, NY 11217 together with her eleven year old son. She has lived in the building for the past five years. Ms. Gonzalez currently holds an unexpired rent-stabilized lease which, but for the use of eminent domain, would be renewable upon its expiration in March 2008.

17. Plaintiff Huda Mufleh-Odeh is a tenant who lives at 481 Dean Street, Apartment 2, Brooklyn, NY 11217 together with her husband, Ismail, and two sons aged four and six years. She is pregnant and due to give birth in November 2006. The Odehs have a two-year lease for their apartment from their landlord, Naseer Ahmed, which does not expire until June 2007. They have lived in their apartment for the past eight years.

18. Plaintiff Jan Akhtar is a tenant who has lived at 481 Dean Street, Apartment 3, Brooklyn, NY 11217, together with her nine children who range in age from eight years to 23 years old, for the past 12 years. Ms. Akhtar has a two-year lease from her landlord, Naseer Ahmed, which does not expire until October 31, 2007.

19. Plaintiff David Sheets is a rent-stabilized tenant who has lived at 479 Dean Street, Apartment 1, Brooklyn, NY 11217 for the past eight years. Mr. Sheets's building was recently purchased in May 2006 by FCRC entity the "Atlantic Yards Development Sub A, LLC." The building at 479 Dean Street is subject to so-called "friendly taking" through a transfer of the property from FCRC to the state ESDC which would result in the displacement of all the building's currently rent-stabilized tenants.

20. Plaintiffs Joseph Pastore is a rent-controlled tenant who has lived in a studio apartment at 473 Dean St., Apt. 3A since 1967 (when he was twenty-two years old). He is now sixty-two and is retired. His rent is $396.87 per month. His building is owned by an FCRC entity, and it is subject to so-called "friendly taking" through a transfer of the property from FCRC to the state ESDC which would result in the displacement of all the building's currently rent-regulated tenants.

21. Plaintiffs Maria Gonzalez, Jackie Gonzalez, Yesenia Gonzalez, Huda Mufleh-Odeh, Jan Akhtar, David Sheets and Joseph Pastore are collectively referred to as "the Tenant Plaintiffs."

Defendants

22. Defendant George E. Pataki (the "Governor") is the former Governor of the State of New York. The Governor acted as an employee, agent, and servant of the State, within the scope of his employment, and as a policy-maker with respect to State agencies, State development corporations and public authorities under

his control, including without limitation the New York Urban Development Corporation doing business as the Empire State Development Corporation ("ESDC"), and the Metropolitan Transportation Authority ("MTA"). The Governor's principal place of business is the State Capitol Building, Albany, New York. Governor Pataki is sued in his individual capacity.

23. Defendant Charles A. Gargano ("Gargano") is the "Development Czar" for the State of New York, holding numerous posts, including without limitation, Chairman of defendant New York State Urban Development Corporation d/b/a Empires State Development Corporation ("ESDC"), acting in his official capacity as an employee, agent, and servant of the State, within the scope of his employment, and as a policy-maker with respect to State public benefit corporations and public authorities under his control, including without limitation the ESDC. Gargano's principal place of business is 633 Third Ave., New York, New York. Gargano is sued in his official and individual capacities.

24. Defendant New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a corporate governmental agency of the State, constituting a political subdivision and public benefit corporation. ESDC is wholly controlled by defendants Pataki and Gargano. It consists of nine directors. The Superintendent of Banks serves as a director as does the Chairman of the New York State Science and Technology Foundation. The remaining seven directors are appointed by defendant Pataki, as is the Chairman, defendant

Gargano. It has its principal place of business at 633 Third Ave., New York, New York.

25. Defendants Pataki, Gargano and ESDC are collectively referred to as the "State Defendants."

26. Defendant Bruce C. Ratner ("Ratner") is President and Chief Executive Officer of "FCRC" as defined below. Ratner's principal place of business is 1 Metrotech Center North, Brooklyn, New York.

27. Defendant Forest City Enterprises, Inc. ("FCE"), is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 1100 Terminal Tower, Cleveland, Ohio. Among other things, FCE does business in the State of New York and is a corporate parent to, and/or affiliate with, many of the entities involved in the Project, and may now, or soon, be the successor in interest to some or all of the entities that comprise "FCRC" as defined below.

28. Defendant Forest City Ratner Companies, holds itself out as a corporation organized and existing under the laws of the State of New York with its principal place of business at 1 Metrotech Center North. Among other things, Forest City Ratner Companies is responsible for the Project.

29. Ratner Group, Inc., is a corporation organized and existing under the laws of the State of New York with its principal place of business at 1 Metrotech Center North. Ratner Group, Inc. holds itself out as a principal in Forest City Ratner Companies, and as such is directly involved in the Project.

30. BR FCRC, LLC, is a limited liability company organized and existing under the laws of the State of New York with its principal place of business at 1 Metrotech Center North. BR FCRC, LLC, holds itself out as a principal in Forest City Ratner Companies, and as such is directly involved in the Project.

31. Brooklyn Arena, LLC, holds itself out to be a limited liability company organized and existing under the laws of the State of New York having an office at Forest City Ratner Companies at 1 Metrotech Center North. Brooklyn Arena, LLC, holds itself out as the arena developer for the Project.

32. Atlantic Yards Development Co. LLC, holds itself out to be a limited liability company organized and existing under the laws of the State of New York having an office at Forest City Ratner Companies at 1 Metrotech Center North. Atlantic Yards Development Co. LLC holds itself out as the project developer for the Project.

33. BR LAND, LLC is a limited liability company organized and existing under the laws of the State of New York with its principal place of business at 1 Metrotech Center North. BR LAND, LLC, holds itself out as a principal in Atlantic Yards Development Co. LLC, and as such is directly involved in the Project.

34. FCR LAND, LLC is a limited liability company organized and existing under the laws of the State of New York with its principal place of business at 1 Metrotech Center North. FCR LAND, LLC, holds itself out as a principal in Atlantic Yards Development

Co. LLC, and as such is directly involved in the Project.

35. Defendant James P. Stuckey ("Stuckey") is Executive Vice-President of "FCRC" and President of the Atlantic Yards Development Group of FCRC, charged with responsibility over the Project. Stuckey's principal place of business is 1 Metrotech Center North, Brooklyn, New York.

36. Defendants Bruce C. Ratner, James P. Stuckey, Forest City Enterprises, Inc., Forest City Ratner Companies, Ratner Group, Inc., BR FCRC, LLC, Brooklyn Arena LLC, Atlantic Yards Development Co. LLC, BR LAND, LLC and FCR LAND, LLC are hereinafter referred to collectively as "FCRC".

37. Defendant New York City Economic Development Corporation ("EDC") is a not-for-profit development corporation organized and existing under the laws of the State of New York, having its principal place of business at 110 William Street, New York, New York 10038.

38. Defendant City of New York ("City") is a municipality organized and existing under the laws of the State of New York. At all times relevant hereto, defendant City, acting through Mayor Bloomberg, Deputy Mayor Doctoroff, Andrew Alper, Joshua Sirefman and EDC, was responsible for the policy, practice, supervision, implementation, and conduct of all matters relating to this complaint, including the appointment, training, supervision, and conduct of all employees. In addition, at all relevant times, defendant City was responsible for ensuring that City

personnel obey the Constitution and laws of the United States and of the State of New York.

39. Defendant Michael Bloomberg is the Mayor of the City of New York, acting in his official capacity as an employee, agent, and servant of the City, within the scope of his employment, and as a policy-maker with respect to the City agencies under his control, including EDC. The Mayor's principal place of business is City Hall, New York, New York 10007. The Mayor is sued in his official and individual capacities.

40. Defendant Daniel L. Doctoroff is a Deputy Mayor of the City of New York in charge of economic development and rebuilding, acting in his official capacity as an employee, agent, and servant of the City, within the scope of his employment, and as a policy-maker with respect to the City agencies under his control, including EDC. Defendant Doctoroff is sued in his official and individual capacities.

41. During part of the period giving rise to plaintiffs' claims defendant Andrew M. Alper was the President of EDC, acting in his official capacity as an agent, and servant of the City, within the scope of his employment, and as a policy-maker with respect to EDC. Defendant Alper is sued in his official and individual capacities.

42. Defendant Joshua Sirefman was the acting President of EDC, acting in his official capacity as an agent, and servant of the City, within the scope of his employment, and as a policy-maker with respect to EDC. Defendant Sirefman is sued in his official and individual capacities.

43. Defendants EDC, City of New York, Bloomberg, Doctoroff, Alper and Sirefman are hereinafter referred to collectively as the "City Defendants."

JURISDICTION AND VENUE

44. Plaintiffs bring this action pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Declaratory Judgment Act, 28 U.S.C. § 2201, to redress the deprivation under color of state law of the plaintiffs' rights under the Fifth and Fourteenth Amendments to the United States Constitution. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a), 1367(a).

45. Venue is proper pursuant to 28 U.S.C. § 1391 because a majority of the parties reside in this judicial district, and because a significant portion of the events or omissions giving rise to plaintiffs' claim occurred in this district as well.

FACTS

46. The Project consists of 16 towers, ranging from approximately eighteen stories to sixty stories, and a sports arena. As currently proposed, the Project contains 8.6 million square feet, with 6,860 residential units and approximately 600,000 square feet of office space. The Project covers approximately twenty-two acres which is currently comprised of the MTA's 8.5-acre active rail yard and bus depot, city streets, two city properties and sixty-eight privately-owned parcels totaling 123 tax lots.

47. Defendants have declared that the Project is a "land use improvement project" and a "civic project" within the meaning of the New York State Urban Development Corporation Act ("UDCA"). This declaration is a prerequisite to ESDC wielding its eminent domain power in furtherance of the Project under state law.

48. The site of the Project – bounded generally by Atlantic Avenue to the North, Dean Street to the South, Fourth Avenue to the West, and Vanderbilt Avenue to the East – was not designated for economic development by any government body. It was not chosen for redevelopment by the City of New York; it was not chosen by ESDC. The site was selected by FCRC, a collection of the private entities through which Ratner does business.

A. The Project's Inception

49. FCRC is not new to Brooklyn. Over the past 15 years, FCRC has developed two major commercial sites in downtown Brooklyn – the Metrotech Center, where FCRC is headquartered and, directly adjacent to the proposed project site, the Atlantic Terminal Mall and the Atlantic Center Mall (in which the ESDC is a tenant paying market rate rent to its landlord FCRC).

50. Directly south of the Atlantic Terminal Mall is an area which FCRC has been interested in developing for residential and commercial use for many years.

51. By the summer of 2002, FCRC had developed plans for the Project – plans which centered on several huge commercial and residential buildings and an

indoor sports arena – and were ready to quietly approach City officials for support. Support came, virtually immediately; by the end of that summer, Mayor Bloomberg and his deputy for economic development, Daniel Doctoroff, were on board.

52. Only one element – a key part of FCRC's planned public relations effort to garner support for the Project – was missing: a professional sports team to occupy the arena. Within a year, FCRC had made an offer to buy the New Jersey Nets and announced that it planned to move the team to a new arena that it would build in Brooklyn, along with the single largest residential and commercial real estate development in City history.

53. On December 11, 2003, with both Governor Pataki and Mayor Bloomberg already lined up behind it, FCRC announced the Project – a $2.5 billion "Atlantic Yards" development project, which at that point contemplated sixteen towers, 2.1 million square feet of commercial space and 4,500 residential units.[2]

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[2] Since the initial announcement, the plan has been revised at least twice. On or about May 2005, defendant Stuckey announced that FCRC had revised its publicly stated plans for the Project. FCRC's "revised" plan for the Project increased the overall estimated price-tag from $2.5 billion to $3.5 billion, increased the height of some of the towers, increased the overall density, decreased the amount of office space and increased the number of residential housing units. And, on or about September 16, 2005, the Draft Scope of Analysis for Environmental Review was released. The document revealed a significant reduction in office space (and thus a two-thirds reduction in the claimed jobs that went with the space), an addition of 2800 luxury condominiums,

54. At the time, Ratner stated that "just" 100 residents, all within a single block, would have to be ousted and moved to make way for the Project. Later, a spokesperson for FCRC backed away from Ratner's number, calling it a "guesstimate" and stating that a precise number would only be known once the condemnation process began.

B. The "Takings Area"

55. The proposed footprint for the Project is comprised of two separate sections: one where the land is owned principally by the Metropolitan Transit Authority ("MTA") and the other where it is held principally by private parties. Nearly half of the Project site's acreage is comprised of a portion of the Atlantic Terminal Urban Renewal Area ("ATURA") designated by New York City in 1968, which contains the MTA Vanderbilt rail yards. The remainder of the footprint is privately held land – mostly residential and commercial buildings, some seventy parcels in all. It is this second area where defendants will resort to taking plaintiffs' properties by eminent domain (the "Takings Area").

56. The Takings Area, where each of the plaintiffs' properties is located, is not part of the ATURA.

57. Although the ATURA has undergone ten amendments (the most recent approved by the City

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and revealed that the one acre park on the arena roof would now be private not public as FCRC initially claimed.

Council in April 2004), its boundaries have never been expanded to include the Takings Area.

58. And, in the 38-year history of the ATURA, the City of New York has never declared that the Takings Area was "blighted" and has never designated it for redevelopment.

59. Indeed, far from being "blighted," the Takings Area rests smack in the middle of some of the most valuable real estate in Brooklyn. In the decade preceding the unveiling of Defendants' Project, most of the Takings Area was re-zoned, permitting adaptive reuse of existing manufacturing buildings, and luxury condominiums were being built in and around the Project's footprint. Since then, and until FCRC announced the Project and began buying up and warehousing buildings in the area, the neighborhood was flourishing; attracting all manner of City dwellers and commercial enterprises to the townhouses and low rise industrial buildings typical of the area.

60. Now, three years after the Project was announced, defendants self-servingly contend that the Takings Area is "blighted" and in need of redevelopment. If there is stagnation in any part of the Takings Area, it is the result of the Project itself: following the Project's announcement in 2003, FCRC, using the threat of eminent domain, has aggressively purchased property in the Takings Area, cleared out buildings, and left them empty while it moves forward with the Project and the condemnation of plaintiffs' properties.

61. In its fervor to purchase as much property as possible within the Takings Area, FCRC has repeatedly warned reluctant property owners that they only have two choices; sell to FCRC or wait until FCRC takes their property by eminent domain.

62. The threatened and actual seizure of plaintiffs' properties in the Takings Area is a transparent effort to co-opt the government's power of eminent domain in order to expand a private development and maximize the profits it generates.

63. The ATURA could easily be redeveloped without involving the Takings Area; and a large mixed-use residential and commercial complex could be built without taking a single piece of private property by eminent domain.

64. Defendants' contention that this is an "economic development project" and that the seizure of land in the Takings Area is necessary to further that purpose is simply false.

C. The Role of State and Local Government

65. The New York City Council is *the* elected local legislative body of the City of New York; its fifty-one members, separately and as a group, are the voice of the people in this City. The City Council sets all zoning and land-use rules.

66. New York City's fifty-nine Community Boards provide a forum for the voices of ordinary people to be heard at the neighborhood level whenever major land

use questions arise under the Uniform Land Use Review Procedure ("ULURP") of the City Charter.

67. For this Project, however – the largest single-source development in City history – neither the City Council nor the affected Community Boards will have any meaningful voice. By executive fiat, at both the state and local levels, these processes have been bypassed.

68. In December 2003, FCRC and Mayor Bloomberg announced that the Project would be developed by FCRC in concert with ESDC, and would thus bypass City review altogether, including ULURP.

69. The decision to designate ESDC as the sponsor of the Project allowed defendants to bypass the normal City land use approval process and to ignore the limitations of the City zoning code. FCRC could thereby construct a project many times exceeding the size permitted in the zoning code – without rezoning – and to include uses, such as the arena in proximity to residences that would otherwise not be permitted.

70. On or about February 18, 2005, defendants memorialized much of their agreement in a Memorandum of Understanding ("MOU") between the State (through ESDC), the City and FCRC, including their plan to bypass all meaningful local community review of the project by designating ESDC as the lead agency.

71. On the same day, a second memorandum of understanding was executed by ESDC, the City and FCRC. The second MOU was withheld from the public

until approximately six months later when it was produced in response to a Freedom of Information Law request. The second MOU described the Project and designated ESDC as the lead agency for development in the ATURA, thus bypassing, as had been done for the Project as a whole, all local power to pass on zoning changes or transfers of unused development rights.

72. Both MOUs contained economic benefits to FCRC that are atypical. Under the first MOU, FCRC will receive a raft of special discretionary benefits not available as-of-right to real estate developers, including $200 million in capital contributions from the City and State, low-cost financing for the arena, extra property tax savings, a low-cost lease, and the guaranteed transfer of private property through eminent domain. The second MOU secured for FCRC a virtually unfettered right to develop certain parcels in the ATURA, including areas *outside the Project,* without interference by the City.

D. The Sham Bid Process for the Railyards

73. In order for the Project to move ahead, FCRC had to secure from the MTA the right to develop the Vanderbilt Rail Yard properties (which are located within the ATURA and used by the Long Island Railroad). This was never a significant obstacle. Prior to September 2003, the MTA repeatedly stated and confirmed that FCRC had in fact obtained the rights to build over the MTA rail yards.

74. But in and around September 2003, the MTA thought better of its prior disclosures concerning its deal with FCRC and retracted them. On or about

February 24, 2005, the MTA went so far as to execute a "letter agreement" with FCRC that made it appear as if a final agreement on the sale of the MTA's property to FCRC had not yet been reached – although, in fact, such an arrangement had long been secured.

75. On or about May 25, 2005, intent on creating the appearance of an open bidding process (even though the outcome was predetermined), the MTA released a request for proposals ("RFP") for purchase of the development rights to the rail yards with a deadline of July 6, 2005 for proposals.

76. The sham RFP was profoundly biased in favor of FCRC. Whereas FCRC had been working on its (pre-approved) proposal for purchase of the railyards *with* the MTA and other State officials for more than two years, the RFP gave everyone else forty-two days to generate proposals. Among other things, the RFP required proposers to submit a twenty-year profit and loss statement *(pro forma)*.

77. FCRC submitted a formal bid to develop over the railyards, offering to pay the MTA $50 million, $164.5 million less than the appraised value of $214.5 million. Notably, FCRC failed to submit a profit and loss projection as the RFP required.

78. Surprisingly given the short turnaround time, a second bidder for the property emerged, Extell Development Company, a large and highly reputable real estate developer. The Extell bid was for $150 million, was much smaller in scale than FCRC's, and did not require the taking of any private property by eminent domain. Extell even submitted the required

twenty-year profit and loss statement and in its bid proposed to go through ULURP and a vote by the City Council. The MTA refused to meet with Extell to answer technical questions prior to the submission deadline, even though they had spent several years working with FCRC to perfect the technical aspects of their proposal. The MTA also refused to meet with Extell after the bids were submitted.

79. Extell was never in the running. On July 27, 2005, consistent with its prior understanding with FCRC, and notwithstanding the overall superiority of the Extell bid, the MTA Board voted on a pre-prepared motion to grant FCRC the exclusive right to negotiate the terms of sale agreement with the MTA over the course of forty-five days.

80. This outcome was what defendants had planned all along. Approximately forty-five days later, on September 14, 2005, the MTA and FCRC formally announced that FCRC would pay $100 million for the rights to the site, still well below the appraised value and below the Extell bid. When the lone dissenting MTA Board member, Mitch Pally, asked for an explanation, MTA Board Chair Peter Kalikow replied, "I'm not going to be beholden by that appraisal, it's just some guy's idea of what those yards are worth."

81. Prior to the vote, defendant Doctoroff wrote to the MTA Board and declared that the City would only commit its financial resources to the FCRC Project.

82. In violation of the terms of the RFP, FCRC never provided the MTA with its projected profits from the Project. When pressed by a reporter to reveal

FCRC's anticipated profits, defendant Stuckey claimed that profit numbers would emerge only *after* the Project was completed. Stuckey defended FCRC's right to make money remarking: "It is, after all, America".

E. The Patina of Public Participation

83. On or about July 24, 2006, ESDC issued a Notice of Public Hearing to comply with State environmental and eminent domain laws. The hearing was scheduled thirty days later (the minimum allowed under state law) on August 23, 2006. Defendants attempted to curb the number of persons who would attend and object to the Project by setting the notice period and the hearing date during a time of year when many New Yorkers are away for summer vacation and the local community boards are in recess.

84. The hearing was held, as scheduled, on August 23, 2006. Many people wishing to attend could not get in and most wishing to speak were not allowed to do so. Property owners who came in response to the public notice were not allowed to testify orally.

85. Defendants also scheduled a community forum for September 12, 2006. Focused again on avoiding opposition, defendants picked the one date for the forum when people who are involved in politics and oppose the Project would likely be consumed by other matters – Primary Election Day.

86. The final deadline for public comment on the Project was September 29, 2006.

87. On December 8, 2006, the ESDC issued a formal Determination and Findings in connection with the Project pursuant to Article 2 of the E.D.P.L. Through the Determination and Findings, the ESDC determined that it should and will use its power of condemnation to acquire Plaintiffs' properties.

88. The condemnation and seizure of plaintiffs' properties will follow in short order.

F. The Pretext

89. Defendants have attempted to justify the taking of private property for the benefit of a private party on four main grounds: (1) the Project will result in a net economic benefit to the City and State; (2) the taking is necessary to eliminate urban blight; (3) that the Project will create significant affordable housing; and (4) the Project will create thousands of new jobs. These alleged "public benefits" are either wildly exaggerated or simply false. At best, the public benefits that the Project offers are incidental; at worst, they are non-existent.

1. Pretext #1: Net Economic Benefit

90. Defendants' calculation of the net economic benefit to the City and State rests upon a faulty premise: that the net benefit can be calculated without regard to the attendant public costs that the Project imposes. Once the costs are factored in, the net economic benefit is either negligible or non-existent.

91. The basis for defendants' claim that the Project will be economically beneficial is a document referred

to by ESDC as an "independent economic impact analysis." ESDC claims that this independent analysis demonstrates that there would be a $1.4 billion net gain in tax revenues. Until last week, ESDC refused to disclose any aspect of the "independent economic impact analysis."

92. What is clear is that the costs of the Project to the public are not disclosed, much less accounted for, by ESDC or FCRC. These public costs include, without limitation: costs for the taking of plaintiffs' property by eminent domain, direct subsidies, tax breaks, tax abatements, below market value land, triple tax free bonds, a blank check called "extraordinary infrastructure costs," the cost of moving public utilities and housing subsidies.[3]

93. At least one organization, the Council of Brooklyn Neighborhoods (CBN), quantifies the public cost missing from defendants' economic analysis at $600 million. Because an additional $138 million will need to be spent to build new schools to handle the current "insufficient capacity" acknowledged in the DEIS, a calculation of net economic benefit must add that amount to the cost side of the ledger – boosting the unaccounted shortfall to $738 million. Add to that approximately $76 million, in "qualitative" costs incurred based on factors such as traffic, shadows and increased air pollution and the total CBN figure reaches more than $800 million.

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[3] These costs to the public are, of course, also benefits for FCRC.

94. Other organizations have calculated the unaccounted for public costs at nearly $2 billion without the cost of housing subsidies.

95. Other unaccounted public costs, include: (1) paying to build the requisite platform over the rail yard as there is no evidence that this will be paid for by FCRC; (2) the Payments in Lieu of Taxes (PILOTs) which will not be paid to the City of New York, but rather will be used by ESDC to cover the bonds for the arena and debt service; and (3) the failure to allow that the City share in the arena profits which instead belong exclusively to FCRC.

96. The picture is even more bleak if one isolates and examines the alleged *raison d'etre* of the Project, the sports arena. According to the Independent Budget Office of New York City (IBO), the sports arena will bring in less than $1 million per year in new tax revenue for the City over thirty years – even assuming that a large percentage of current New Jersey based fans will come to the new arena in Brooklyn. If that percentage is lower, as it likely will be, the arena will be a money loser for the City of New York.

97. Once these costs, along with the economic impact and the environmental impacts on traffic, public transportation, health and security are tallied, defendants' claim of $1.4 billion in revenue for the public becomes untenable.

2. Pretext #2: The Elimination of Blight

98. Defendants assert that the taking of plaintiffs properties is necessary to eliminate "blight" in the Takings Area. This assertion is a classic *post-hoc* justification – a pretext with no basis in fact.

99. When the Project was unveiled in the fall of 2003, the elimination of blight in the Takings Area was never raised as a justification for the taking of private property, or for the development of the Project in general. This was not an oversight born of early enthusiasm over the Project: the City of New York has never declared the Takings Area blighted despite 38 years of opportunity to do so, and neither of the two MOUs between the City, the State, and FCRC so much as reference "blight" as a basis for government action or otherwise.

100. As the Project drew greater scrutiny, however, defendants commissioned a "Blight Study" of the area to be performed by a company called AKRF. FCRC paid for the study.

101. AKRF is the antithesis of an independent consultant. On information and belief, each and every time AKRF has been retained to study a project in conjunction with an environmental review in New York City, it has drawn conclusions that favored the proposed project. This blight study was no exception.

102. The conditions that the AKRF Blight Study found to be "blighted" in fact are a direct result of the Project itself and the attendant non-enforcement and neglect by the City of New York, the New York City

Department of Transportation, the MTA and FCRC, as well as property warehousing by FCRC.

103. Even accepting the six characteristics of blight described by AKRF for each lot in the Blight Study, only 27% of the 73 parcels examined, at most, could be considered blighted.

104. Only 19% of the Takings Area blocks and tax lots could be considered "blighted"; and that 19% is owned entirely by FCRC. None of the "blighted" properties is owned by the plaintiffs.

105. Prior to the December 2003 unveiling of the Project, there were a total of fifteen vacant tax lots out of 123, or just 12% of the study area. A little less than three years later, there are now ninety total vacant tax lots out of 123 total tax lots or 73%. Eighty-eight of the ninety total vacant tax lots or 98% of the vacant tax lots are owned by FCRC. Eighty-three of FCRC's eighty-eight vacant tax lots were either demolished and thus made vacant or ignored and kept vacant by FCRC.

106. The increase in vacant tax lots between December 2003 and October 1, 2006 is a staggering 600%. This increase is squarely attributable to defendants own conduct.

3. Pretext #3: Significant Increase In Affordable Housing

107. Fundamentally, the Project is comprised of luxury housing – apartments that will sell and rent at market rates to households earning more than

$113,400. At least 69%, or 4,610, of the Project's proposed housing units will be market rate, luxury units. And the remaining "affordable" units are not guaranteed.

108. Defendants assert that 2,250, or 31%, of the total of 6,860 housing units in the Project will be "affordable," meaning that their rents will be set at 30% of the median income for the income band for which the housing is reserved. But just 550 of those units – roughly a quarter of the affordable units and approximately 5% of the total units planned – are slated to be in the first of two phases of construction (Phase One).

109. The remaining 1,700 affordable units are supposed to be built in Phase Two, but that is not guaranteed both because no firm timetable exists for Phase Two construction and because there is no existing legally enforceable obligation that mandates the construction of affordable housing. In this sense, at least, the addition of affordable units to the neighborhood is both minimal and uncertain.

110. Viewed from the perspective of residents' income, the affordable units proposed from the Project will not remotely offset the impact of the luxury housing.

111. As a result of the Project, in the DEIS study area, there will be a 7% decrease in the proportion of households earning between $21,270 and $28,360; a 6% decrease in the proportion of households earing between $29,069 and $35,450; and a 16% decrease in the proportion of households earning between $42,540

and $70,900. By contrast, the Project will increase by 53%, the number of households earning over $113,00 per year.

112. All of this is directly attributable to Project's definition of "affordable." Nearly 90% of the Project's housing will be priced for household incomes above Brooklyn's median income. Nearly 85% of the units will exclude households with an income of less than $56,000, which is the New York City public housing eligibility maximum for a four-person family.

113. No units will be available for household's earning $21,000 or less.

114. Nearly half of the units described as "affordable" are slated for household incomes between $71,000 and $113,000.

115. The Project has reserved 64% of its units for household incomes above $113,440, whereas in the area within a 3/4 mile radius of the Project only 11% of the residential units are priced above $113,400.

116. In addition to the risks facing tenants in the project's footprint, the DEIS anticipates that approximately 3,000 people are potentially at risk of involuntary displacement due to the Atlantic Yards project.

4. Pretext #4: Job Creation

117. Defendants assert that the Project will create new jobs in two categories: temporary construction jobs, as the Project is built; and permanent office jobs,

as its commercial space is rented out. Defendants' claims as to both categories are grossly distorted and demonstrably untrue.

118. First, defendants claim that the Project will generate 15,000 construction jobs. This is grossly misleading. In the first place, FCRC is not referring to new jobs for 15,000 construction workers, but to the number of job *years*, guessing that there will be one construction job for 1,500 persons per year for ten years. Secondly, *any* project to develop the rail yard on a similar scale (*e.g.*, the Extell project) would generate a significant number of job years – even if it would not require the taking of plaintiffs' properties. Accordingly, the creation of these job years does not justify the taking of plaintiffs' property.

119. Defendants have also claimed that the Project will create 2,500 office jobs.[4] Upon scrutiny, however, it was revealed that this is actually the creation of commercial rentals for FCRC that will create *space* for 2,500 office jobs. And it appears that most of those jobs are not "new" jobs at all, but simply retained positions.

120. Defendants have also guessed that the arena would generate 400 new jobs. According to defendant Stuckey, however, the current employees in New Jersey would have the first right to these jobs due to existing union rules. Accordingly, to some degree at

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[4] Defendants initially claimed that the Project would produce 10,000 new office jobs. Over time, this number has been reduced by nearly 75%.

the least, even most of these jobs are not likely to be new will be occupied not by New Yorkers, but by commuters from New Jersey.

G. Benefit to FCRC

121. While there is no question that FCRC will profit enormously from the Project, the magnitude of that profit cannot be identified at this time because FCRC has refused to provide this information.

122. FCRC refused to provide the 20 year pro forma financial projections required by the MTA's RFP. Similarly, FCRC has not disclosed the 30 year pro forma financial projections that it is required to provide in the MOU it signed with the City and State.

123. Notwithstanding defendants refusal to provide this information, FCRC's profit has been conservatively estimated at a billion dollars ($1,000,000,000).

124. FCRC's profit will certainly be greater than the public return, if any.

125. The overwhelming majority of the financial risk will be borne by the public, not FCRC.

H. Friendly Takings

126. In addition to the hostile seizure of plaintiffs' properties, defendants will also execute a number of friendly takings. The friendly takings consist of defendants acquiring, without objection, title to

FCRC's own properties, presumably after paying "just compensation" as required by the Fifth Amendment.

127. As it happens, however, these FCRC properties have tenants, like the plaintiff residing at 479 Dean Street, that are protected from eviction without cause by State rent laws.

128. Absent defendants scheme to take FCRC property through condemnation, FCRC would be unable to demolish its buildings and evict these tenants without first providing relocation and compensation under the Emergency Tenant Protection Regulations ("TPR") and the Rent Stabilization Code ("RSC"). *See* TPR §2504.4(f) and RSC §2524.5(a)(2).

129. Without a friendly taking, landlords who are demolishing rent-stabilized buildings must obtain approval from the State Division of Housing and Community Renewal and must either offer replacement housing at the same rent, a stipend to cover the anticipated difference in rents for a six year period, or some combination of those two options. *See* 9 N.Y.C.R.R. § 2524.5(2).

130. Thus, in one fell swoop, the friendly taking will allow FCRC (i) to avoid the rent laws and their "onerous" relocation requirements, (ii) to evict all tenants without any cause or justification, and (iii) to line its pockets with additional funds from the public fisc.

FIRST CAUSE OF ACTION
(42 U.S.C. § 1983/Takings Clause)

131. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth at length herein.

132. The Takings Clause of the Fifth Amendment to the United States Constitution, prohibits the government, and those acting in concert with the government, from taking private property unless the taking is for a "public use."

133. By taking plaintiffs' property and giving it to FCRC, defendants intend to benefit FCRC.

134. FCRC is the primary beneficiary of the taking of plaintiffs' properties.

135. The public does not benefit from the taking of plaintiffs' properties.

136. Alternatively, insofar as the public derives any benefit from the taking of plaintiffs' properties, it is secondary and incidental to the benefit that inures to FCRC.

137. Defendants' desire to confer a private benefit to FCRC was a substantial, motivating factor, in defendants' decision to seize plaintiffs' property and transfer it to FCRC.

138. As set forth above, among other indicia that the taking of plaintiffs' properties is being done to benefit FCRC, without limitation, are:

(A) the Project was wholly conceived by FCRC;

(B) absent FCRC's persistence in pursuing the Project, there would be no development at the site that would require the condemnation of plaintiff's property;

(C) not a single alternative plan (much less multiple plans) was considered before the determination to proceed with the Project;

(D) not a single alternative private developer (much less multiple developers) was considered before the determination to proceed with FCRC;

(E) the beneficiary of the land transfer by eminent domain was known long before the determination to proceed;

(F) there was no meaningful community or local input before (or even after) the decision to proceed;

(G) the Project is not the product of a carefully considered development plan;

(H) the environmental impact of the Project was not studied before the determination to proceed;

(I) the social ramifications of the Project were not considered before the determination to proceed;

(J) there was no independent consultant or team of consultants who evaluated the Project before the determination to proceed;

(K) there was no finding that the Project was consistent with the overall development goals of the City and State before the determination to proceed;

(L) there was no finding that the area to be condemned was blighted before the determination to proceed;

(M) New York City is not struggling to rebound from an economic depression;

(N) Brooklyn is not struggling to rebound from an economic depression;

(O) the substantial public financing and incentives provided for the program were not put in place *before* the developer was known;

(P) the economic benefits, if any, to be realized from the Project are *de minimus*; and

(Q) many of the procedural protections in place to prevent development without local and community input and approval were bypassed.

139. Defendants' claims of public benefit are a pretext to justify a private taking.

140. As set forth above, among other indicia that defendants' claims of public benefit are a pretext, without limitation, are:

(A) the Project will not actually create more jobs;

(B) the Project will not generate a net economic benefit for the community or the City or any gain will be *de minimus;*

(C) the Project will not materially increase available affordable housing; and

(D) the area slated for condemnation is not blighted.

141. Defendants' decision to take plaintiffs' property, as detailed above, deprived plaintiffs of rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, but not limited to, rights guaranteed by the Takings Clause of the Fifth Amendment to the United States Constitution.

142. In addition, upon information and belief, defendants conspired among themselves to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fifth Amendment to the United States Constitution, and took numerous overt steps in furtherance of such conspiracy, or failed to prevent others from depriving plaintiffs of their constitutional rights, as set forth above.

143. Defendants acted at all times under color of law.

144. Defendants acted under pretense and color of state law and with the exception of the FCRC defendants, in their individual and official capacities and within the scope of their respective employments as government employees or agents. The non-FCRC defendants acted beyond the scope of their jurisdiction, without authority of law, and abused their powers.

145. The FCRC defendants acted at all times in concert with the other defendants.

146. All defendants acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fifth Amendment to the United States Constitution.

147. As a direct and proximate consequence of defendants' unconstitutional actions and abuse of authority, plaintiffs have suffered actual damages, in forms including, without limitation, out of pocket losses and expenditures, lost past and future earnings, mental anguish, pain and suffering.

148. Unless defendants are enjoined from taking plaintiffs' properties through the use of eminent domain plaintiffs will suffer great and irreparable harm.

SECOND CAUSE OF ACTION
(42 U.S.C. § 1983/Equal Protection)

149. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth at length herein.

150. The Fourteenth Amendment to the United States Constitution prohibits the government, and those acting in concert with the government, from subjecting an individual to adverse or differential treatment without a rational basis.

151. By selecting plaintiffs' properties to be taken for the purpose of conferring a benefit, here the plaintiffs' property, to FCRC, defendants have targeted plaintiffs for adverse treatment for no rational purpose.

152. Conferring a benefit upon FCRC under the circumstances detailed above is not rational.

153. Elevating the status of one citizen or group of citizens, here FCRC, by mistreating plaintiffs is also prohibited by the Equal Protection Clause.

154. By singling out plaintiffs, for unequal, adverse, treatment, and selecting FCRC as the recipient of irrational largess, defendants deprived plaintiffs of rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. § 1983, including, without limitation, rights guaranteed by the Fourteenth Amendment to the United States Constitution.

155. In addition, upon information and belief, defendants conspired among themselves to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fourteenth Amendment to the United States Constitution, and took numerous overt steps in furtherance of such conspiracy, or failed

to prevent others from depriving plaintiffs of their constitutional rights, as set forth above.

156. Defendants acted at all times under color of law.

157. Defendants acted under pretense and color of state law and with the exception of the FCRC defendants, in their individual and official capacities and within the scope of their respective employments as government employees or agents. The non-FCRC defendants acted beyond the scope of their jurisdiction, without authority of law, and abused their powers.

158. The FCRC defendants acted at all times in concert with the other defendants.

159. All defendants acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fourteenth Amendment to the United States Constitution.

160. As a direct and proximate consequence of defendants' unconstitutional actions and abuse of authority, plaintiffs have suffered actual damages, in forms including, without limitation, out of pocket losses and expenditures, lost past and future earnings, mental anguish, pain and suffering.

161. Unless defendants are enjoined from taking plaintiffs' properties through the use of eminent domain plaintiffs will suffer great and irreparable harm.

THIRD CAUSE OF ACTION
(42 U.S.C. § 1983/Procedural Due Process)

162. Plaintiff repeats and realleges the preceding paragraphs as if fully set forth at length herein.

163. At all times relevant hereto, plaintiffs had a valuable property interest in their real property, condominium, commercial lease or and status as rent stabilized tenants.

164. By engaging in the scheme set forth above, including without limitation, by: (1) circumventing local and community review and local zoning regulations; (2) failing to provide sufficient time to meaningfully respond between the release of the Draft Environmental Impact Statement and the hearing on August 23, 2006; (3) failing to provide a hearing that allowed plaintiffs to meaningfully state their objections; and (4) at all times providing an empty, meaningless, process, with a pre-determined outcome – defendants impermissibly denied plaintiffs of their property interest without due process of law and conspired among themselves to do so (taking numerous steps in furtherance thereof), or failed to prevent others from doing so.

165. Defendants acted at all times under color of law.

166. Defendants acted under pretense and color of state law and with the exception of the FCRC defendants, in their individual and official capacities and within the scope of their respective employments as government employees or agents. The non-FCRC

defendants acted beyond the scope of their jurisdiction, without authority of law, and abused their powers.

167. The FCRC defendants acted at all times in concert with the other defendants.

168. All defendants acted willfully, knowingly, and with the specific intent to deprive plaintiffs of their constitutional rights secured by 42 U.S.C. § 1983, and by the Fourteenth Amendment to the United States Constitution.

169. As a direct and proximate consequence of defendants' unconstitutional actions and abuse of authority, plaintiffs have suffered actual damages, in forms including, without limitation, out of pocket losses and expenditures, lost past and future earnings, mental anguish, pain and suffering.

170. Unless defendants are enjoined from taking plaintiffs' properties through the use of eminent domain plaintiffs will suffer great and irreparable harm.

FOURTH CAUSE OF ACTION
(N.Y. E.D.P.L. § 207)
(against the ESDC only)

171. Plaintiffs repeat and reallege the preceding paragraphs as if fully set forth at length herein.

172. On December 8, 2006, the ESDC issued a formal Determination and Findings in connection with the Project pursuant to Article 2 of the E.D.P.L.

173. Through the Determination and Findings, the ESDC determined that it should and will use its power of condemnation to acquire Plaintiffs' properties.

174. The ESDC's Determination and Findings are final.

175. As parties aggrieved by the ESDC's Determination and Findings, Plaintiffs are entitled to judicial review of the Determination and Findings.

176. The Determination and Findings do not conform, and result from a proceeding that did not conform, with the United States Constitution.

177. No public use, benefit or purpose will be served by the property acquisition set forth in the Determination and Findings.

178. ESDC violated section 204(a) of the EDPL by failing to make its determination and findings within 90 days of the stated close of the public hearing on Aug 23, 2006. The putative Determination and Findings are thus null and void.

179. On January 5, 2007, Plaintiffs, through their counsel, served the ESDC with a demand that it file with this Court a copy of a written transcript of the record of the proceedings before it, as well as a copy of the Determination and Findings. A true and correct copy of such demand and the proof of service of such demand are attached hereto as Exhibit A.

180. Unless defendants are enjoined from taking plaintiffs' properties through the use of eminent

domain plaintiffs will suffer great and irreparable harm.

WHEREFORE, judgment should be entered as follows:

A. Declaring that the Determination and Findings and the defendants' condemnation of plaintiffs' properties violates the Takings Clause of the Fifth Amendment to the United States Constitution;

B. Declaring that the defendants violated plaintiffs right to due process of law;

C. Declaring that the Determination and Findings and defendants' condemnation of plaintiffs' properties violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

D. Temporarily, preliminarily and permanently enjoining defendants from condemning or taking, and from taking any steps to condemn or take, plaintiffs' properties;

E. Rejecting the Determination and Findings;

F. Awarding compensatory damages against all defendants and punitive damages against all defendants except the City of New York;

G. Awarding plaintiffs' attorney fees and other reasonable expenditures, together with the costs and expenses of this action pursuant to 42 U.S.C. § 1988; and

H. Granting plaintiffs such other and further relief as the Court may deem just and proper.

Dated: January 5, 2007
New York, New York

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IN THE

Supreme Court of the United States

DANIEL GOLDSTEIN, *et al.*,
Petitioners,

v.

GEORGE E. PATAKI, *et al.*,
Respondents.

On Petition for Writ of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF IN OPPOSITION FOR THE ESDC AND MUNICIPAL RESPONDENTS

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QUESTION PRESENTED

Did the courts below properly conclude that the complaint failed to state a claim under the Public Use Clause of the Fifth Amendment where:

- the proposed urban redevelopment project involving eminent domain undisputedly will revitalize a large swath of land in central Brooklyn, more than half of which has been designated blighted and earmarked for redevelopment for more than 40 years and is dominated by open, dilapidated and environmentally hazardous railyards, and

- the project admittedly will include, among other public purposes, construction of a new major sports arena, affordable housing, public open space, and significant public mass transportation improvements?

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This case involves the use of eminent domain in support of the proposed Atlantic Yards Arena and Redevelopment Project in central Brooklyn (the "Project"). The allegations in Petitioners' complaint do not refute, and both courts below unequivocally found, that the Project will remove blight that has plagued more than half the footprint of the Project for at least four decades.

The Project will also accomplish multiple other, well-established public purposes: construction of a $120 million platform over the Vanderbilt Yards—rail tracks which currently are below street level and create an enormous open trench that isolates the Project area from the surrounding communities; a new sports arena designed by renowned architect Frank Gehry containing a 10,000-square-foot public atrium and pedestrian passageway to the subways; office buildings; 6,680 housing units (2,250 of which will be below-market rate); significant mass transit improvements, including a new state-of-the-art railyard for the New York State Metropolitan Transportation Authority and its Long Island Rail Road as well as extensive public subway improvements; and eight acres of publicly accessible open space. The arena will be the home of the National Basketball Association franchise now known as the New Jersey Nets, finally fulfilling the goal of returning a major-league professional sports team to Brooklyn for the first time since the Brooklyn Dodgers left in 1957. The Project will also result in extensive environmental remediation of the Project site.

Although they do not dispute most of the Project's public purposes, Petitioners make the "far-reaching" (App. 10a)[1] claim that condemning their properties to facilitate the Project would violate the Public Use Clause of the Fifth Amendment because the public officials who approved the Project were in fact motivated by the sole or primary purpose of enriching the Project's private developer, and thus the Project's undisputed public purposes are merely "pretextual." Petitioners base this pretext claim upon nothing but conclusory allegations that a host of "corrupt and coopted" (App. 9a) state and city officials (including Respondents Mayor Bloomberg and former Governor Pataki), none of whom had any evident or alleged motive to abdicate their roles of significant public trust to curry favor with the developer or the other private Respondents, conspired to support the Project for private rather than public benefit.

The courts below each properly concluded that Petitioners' claim could not survive a motion to dismiss because, even if a pretext claim was theoretically cognizable in the face of multiple, concededly quintessential public uses, the speculative and conclusory allegations in Petitioners' complaint could not support a claim of pretext.

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[1] References to the Appendix to the Petition for Certiorari are "App." herein. References to the Joint Appendix in the court of appeals are "JA". The Joint Appendix consisted of the Petitioners' complaint and all documents referenced therein. *See, e.g.*, *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007) (courts faced with a Rule 12(b)(6) motion "must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference").

STATEMENT

1. ESDC and the Eminent Domain Process in New York

Respondent New York State Urban Development Corporation d/b/a Empire State Development Corporation ("ESDC") is a public benefit corporation created by the New York State Legislature in 1968. ESDC's primary statutory role is to foster development, urban stabilization and revitalization of distressed areas by eliminating blight and constructing viable commercial, industrial and residential projects that create employment, increase state and local tax revenue and otherwise contribute to the public welfare and civic good.[2]

One of ESDC's most important revitalization tools is its power of eminent domain. The assembly of diversely owned parcels necessary for large-scale projects, particularly in densely populated urban areas that are layered with public infrastructure and competing private interests, is often impossible without condemnation. The original World

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[2] Respondents can be grouped into four sets: (1) former Governor George E. Pataki; (2) the "ESDC Respondents," consisting of ESDC and its former chief executive, Charles A. Gargano; (3) the "Municipal Respondents," consisting of the City of New York, Mayor Michael Bloomberg, former Deputy Mayor Daniel L. Doctoroff, the New York City Economic Development Corporation and two of its former presidents, Andrew M. Alper and Joshua Sirefman; and (4) the "Forest City Ratner (or "Private" or "FCRC") Respondents, consisting of Bruce C. Ratner; James P. Stuckey; Forest City Enterprises, Inc.; Forest City Ratner Companies; Ratner Group, Inc.; FCRC, LLC; Brooklyn Arena, LLC; Atlantic Yard Development Co. LLC; BR Land, LLC; and FCR Land, LLC. This brief in opposition is submitted on behalf of the ESDC and Municipal Respondents.

Trade Center, the revitalization of Times Square, and Lincoln Center for the Performing Arts all are examples of the crucial role of eminent domain in accomplishing critical public policy objectives within major cities such as New York.

In the legislation creating ESDC, the Urban Development Corporation Act of 1968 (the "UDC Act"), N.Y. UNCONSOL. LAWS §§ 6251-6292 (McKinney 2000 & Supp. 2008), New York's legislature delegated to ESDC the sovereign power of eminent domain to achieve its objectives. ESDC is directed to "encourag[e] maximum participation by the private sector of the economy," N.Y. UNCONSOL. LAWS § 6252 (McKinney Supp. 2008), "in part by promoting large-scale real estate projects that create and retain jobs and/or reinvigorate distressed areas." *Develop Don't Destroy Brooklyn v. Empire State Dev. Corp.*, 816 N.Y.S.2d 424, 427 (N.Y. App. Div. 2006), *appeal denied*, 862 N.E.2d 790 (N.Y. 2007). ESDC may use eminent domain to acquire property "necessary or convenient" to carrying out its mission, N.Y. UNCONSOL. LAWS § 6263 (McKinney 2000), and has power to override compliance with local laws (including zoning laws) after consultation with local officials, *id.* § 6266(3).

To exercise its power of eminent domain, ESDC must comply with New York's Eminent Domain Procedure Law ("EDPL"), adopted in 1977 to govern and lend uniformity to eminent domain proceedings in New York. *See* N.Y. EM. DOM. PROC. LAW §§ 101-709 (McKinney 2002 & Supp. 2008). The EDPL establishes comprehensive procedures for extensive up-front public review and input followed by expedited judicial review.

A prospective condemnor first must notice and convene a public hearing concerning the "proposed public project." N.Y. EM. DOM. PROC. LAW § 201 (McKinney 2002); *see also* N.Y. EM. DOM. PROC. LAW §§ 202-203 (McKinney 2002 &

Supp. 2008). A record of the hearing is maintained, and those in attendance have a right to be heard and to have their views entered into the record in writing or orally. N.Y. EM. DOM. PROC. LAW § 203 (McKinney 2002). Next, the condemnor must make and publish "its determination and findings" specifying, among other things, "the public use, benefit or purpose to be served by the proposed public project." N.Y. EM. DOM. PROC. LAW § 204(A), (B)(1) (McKinney Supp. 2008). The deadline for such publication is 90 days from the close of the public hearing. *Id.* § 204(A).

Any "aggrieved" person then has 30 days to challenge the determination and findings in a petition before the Appellate Division of the State Supreme Court, which has "exclusive" jurisdiction. N.Y. EM. DOM. PROC. LAW §§ 207(A), (B), 208 (McKinney 2002). The EDPL directs that the Appellate Division "shall either confirm or reject the condemnor's determination and findings" after considering whether:

> (1) the proceeding was in conformity with the federal and state constitutions,
>
> (2) the proposed acquisition is within the condemnor's statutory jurisdiction or authority,
>
> (3) the condemnor's determination and findings were made in accordance with procedures set forth in this article and with article eight of the environmental conservation law, and
>
> (4) a public use, benefit or purpose will be served by the proposed acquisition.

Id. § 207(C). The EDPL's pre- and post-determination procedures have been upheld as furnishing due process. *See Brody v. Vill. of Port Chester*, 434 F.3d 121, 134-36 (2d Cir. 2005).

Under Article 4 of the EDPL, the last stage of the process before condemnation is the proceeding to acquire title to the properties designated for taking. The prospective condemnor has three years to initiate such a proceeding after a "final order or judgment" has been rendered in the EDPL § 207 proceeding (if one has been filed). *See* N.Y. EM. DOM. PROC. LAW § 401(A)(3) (McKinney 2002). Once notified of the Article 4 proceeding, condemnees-to-be may appear and answer. *Id.* § 402(B)(4). If the court determines that the procedural requirements of the EDPL have been complied with, it grants the petition. *Id.* § 402(B)(5). The "acquisition of the property" becomes "complete" when the condemnor files the court's order with the acquisition map with the county clerk or register. *Id.* The condemnor has 30 days to serve a notice of acquisition upon each condemnee, *see id.* § 502(B), who then may file a claim for just compensation. *See id.* § 503(B).

ESDC's exercise of eminent domain is a discretionary action subject to the State Environmental Quality Review Act ("SEQRA"), N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to 8-0117 (McKinney 2005 & Supp. 2008), which requires state agencies to study and attempt to mitigate the adverse environmental effects of actions they approve.

2. The Atlantic Yards Project

ESDC is the sponsor and lead agency for the Atlantic Yards Project, which was first announced in December 2003. (App. 189a ¶ 68.) Petitioners allege (App. 184a-185a ¶¶ 51-53), and Respondents must assume for purposes of this appeal, that Respondent Forest City Ratner Companies ("FCRC") initiated the Project.

a. The Project Site

The Project's site encompasses 22 acres of land that "has suffered from physical deterioration and relative economic inactivity for at least four decades. Dominated by an approximately 9-acre open rail yard and otherwise generally characterized by dilapidated, vacant, and underutilized properties, the site creates a clear visual and physical barrier between the neighborhoods north and south of Atlantic Avenue" near downtown Brooklyn. (JA222 (blight study).)

While surrounding neighborhoods have experienced a revitalization that began in the late 1970s, the Project site has not—largely because of the remaining below-grade open-air rail yards that divide the area. (JA161-162; 228-229; 237; 1044.) At the heart of this area lie portions of the "Atlantic Terminal Urban Renewal Area" or "ATURA," which was created in 1968 and earmarked for comprehensive redevelopment pursuant to an urban renewal plan. (JA215-216.) As Petitioners concede, the City first designated ATURA as blighted in 1968. (App. 186a ¶¶ 55, 58.) The renewal plan for ATURA has been repeatedly amended over the years, but all prior plans to remediate this blighted site have proven fruitless. As late as April 2004, the City reconfirmed, for the tenth consecutive time, the ATURA's blight designation and extended the accompanying renewal plan for another 40 years. (App. 186a-187a ¶ 57; JA215.)

Petitioners have never disputed that the ATURA is blighted, and that it has been so designated and earmarked for comprehensive redevelopment for forty years. While they grudgingly allege that "[n]early half" the Project site falls within the ATURA (App. 186a¶ 55), the record shows that number to be approximately 63%. (JA215.) The district court accepted the 63% figure (App. 35a), and Petitioners conceded it at oral argument before the court of appeals. Petitioners have defined as the "Takings Area" the entire

non-ATURA section of the Project site (App. 186a ¶ 55), which consists of numerous parcels that were owned by 76 different parties prior to 2003. Currently, only 27 separate tax lots in the Takings Area remain wholly or partially under the control of parties other than the Project sponsor, the City, or the Metropolitan Transportation Authority.

The blight study ESDC commissioned in early 2006, before making the findings necessary to proceed under the UDC Act, confirmed that the blight extended beyond the ATURA into the Takings Area. (JA213-593.) Specifically, the study concluded that one or more blight characteristics were present on most lots within the Takings Area. (JA310-482.) Buildings on five of those lots—ones that FCRC had acquired through private purchase—had so deteriorated that they posed a threat to public safety and had to be demolished immediately. (JA502-543.)[3] *See Develop Don't Destroy Brooklyn*, 816 N.Y.S.2d at 428-29. More generally, the blight study showed that "the non-rail yard portion of the project site is characterized by unsanitary and substandard conditions" including vacant and underutilized buildings, vacant lots, and structures "suffering from serious physical deterioration." (JA216.)[4]

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[3] These buildings' major structural deterioration was not, as Petitioners conclusorily assert (App. 187a ¶ 60), caused by the Project itself. The blight study documents severe and long-standing damage to roofs, floors, and walls, as well as water and rot damage to the timber floorings and floor joists. (JA502-543.) These buildings were, when the study was conducted, "permanently exposed to the elements." (JA502, 510, 515, 519, 522, 530.)

[4] The Petition contains numerous factual assertions that were shown to be false by the record or by the state court in *Develop Don't Destroy (Brooklyn) v. Urban Development* *(cont'd)*

b. Approval of the Project

The extensive review, public input, and approval procedure under multiple state laws is discussed exhaustively in *Develop Don't Destroy (Brooklyn) v. Urban Development Corp.*, No. 104597/2007, 2008 N.Y. Misc. LEXIS 551 (N.Y. Sup. Ct. Jan. 11, 2008), *see id.* at *5-15, and is summarized briefly herein.

In February 2005, ESDC, along with the City of New York and the New York City Economic Development Corporation, joined FCRC in signing two memoranda of understanding concerning the Project (JA1005-1016, 1028-1034), by which it was agreed, among other things, that ESDC would be the "lead agency" under SEQRA for purposes of examining the proposed project's environmental impacts, and that, subject to the approval of ESDC's Board of Directors and other conditions, ESDC would exercise its power under New York state law to override New York City zoning. (App. 189a ¶ 70.) Neither memorandum was an

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Corp., No. 104597/2007, 2008 N.Y. Misc. LEXIS 551 (N.Y. Sup. Ct. Jan. 11, 2008), or that were not properly preserved for consideration by this Court. These include assertions that: (1) property was excluded from condemnation because of a "deal" between FCRC and another developer (Petition at 6 n. 2); (2) a rival developer bid more than FCRC did for the right to build over the Vanderbilt Yards facility (*id.* at 8); (3) the request for proposals to which FCRC and the rival bidder responded was inferior to a subsequent request made by the MTA in connection with a site in Manhattan (*id.* at 9 n. 4); and (4) the Project's creation of 2,250 units of affordable housing will be offset by the displacement of "2,929 at-risk households" (*id.* at 12-13). Respondents reserve the right to present a more comprehensive rebuttal of these and other erroneous factual assertions by Petitioners should the Petition be granted.

approval, binding agreement or final determination concerning the Project.

On September 16, 2005, ESDC announced that the Project might have a "significant effect" on the environment and would therefore necessitate preparation of an environmental impact statement. (JA1036.) On August 23, 2006, in accordance with the directives of EDPL Article 2, ESDC held a duly noticed public hearing on the Project. Additional community forums not mandated by the EDPL were held on September 12 and 18, 2006. (*See* JA1206.) After reviewing comments and testimony received at the public hearing and community forums, as well as the written comments submitted and the Final Environmental Impact Statement, ESDC made its Final Determination and Findings under the EDPL. (*See* JA1204-1227.)

In its Determination and Findings, ESDC announced its decision to exercise eminent domain to support the Atlantic Yards Project. Chief among the public purposes it found the Project would serve was the elimination of blighted conditions within the Project site—both in the ATURA and in the Takings Area. (JA1204, 1207.) Other public benefits and uses identified included:

- "a publicly owned state-of-the-art arena to accommodate the return of a major-league sports franchise to Brooklyn [and] a valuable athletic facility for the City's colleges and local academic institutions";

- "2,250 affordable housing units and between 3,075 and 4,180 market-rate housing units";

- "8 acres of publicly accessible open space that links together the surrounding neighborhoods";

- improved public transit facilities;

- "environmental remediation of the Project Site"; and

- a host of "economic benefits," including the creation "4,538 new jobs in the City" and the generation of billions of new tax dollars for the City and State.

(JA1208-09.)

On December 21, 2006, the New York State Public Authorities Control Board (PACB)—whose three voting members are designees of the Governor, the Speaker of the State Assembly, and the Majority Leader of the State Senate—issued its resolution approving the State's financial contribution to the Project. (JA1310-18.) The City of New York and the Metropolitan Transportation Authority (a State agency) have also consented to the Project. The Project has the support of a host of elected state and local officials, including Senator Charles Schumer and Congressman Ed Towns, then-Governor George Pataki, Mayor Michael Bloomberg, Brooklyn Borough President Marty Markowitz, City Comptroller William C. Thompson, Public Advocate Betsy Gotbaum, and numerous State and City legislators, local leaders, affordable housing advocates and union officials. (JA605-623.)

3. This Action

In October 2006, short-circuiting the EDPL's judicial review process, the Petitioners filed a federal complaint in which they asserted, pursuant to 42 U.S.C. § 1983, that ESDC and the other public Respondents were threatening to violate their constitutional rights under the Public Use Clause of the Fifth Amendment and the Equal Protection and

Due Process Clauses of the Fourteenth Amendment. (App. 204a-212a.) Their theory was—and remains—that a host of public officials, including ESDC employees, Mayor Bloomberg, and then-Governor Pataki, engaged in a wholesale abdication of governmental responsibility by banding together to support the Atlantic Yards Project for the *sole purpose* of conferring a benefit on the Project's corporate sponsor, FCRC, and its CEO, Bruce Ratner. A few days after they filed their complaint, a reporter asked Petitioners' counsel how suit could have been filed "before eminent domain has been used by the state.". (JA1228.) Counsel responded: "[W]e need to get discovery, where we get to question people under oath and get documents that will support what we already know . . . ." (JA1228-29 (emphasis added).)

Kicking off their complaint with bald accusations of "misuse of government[] power" and "betrayal of public trust," Petitioners asserted that all of the public Respondents acted at all relevant times "in service of the interests of a private developer," and, oblivious to their public responsibilities, "obediently [fell] into line" with FCRC's plans for the Project. (App. 171a-172a) The "facts" identified to support this conspiracy theory consisted, in essence, of complaints about the process and sequence by which the Project was first proposed and developed (App. 184a-194a)—a process and sequence that comported fully with the procedures enacted by the legislature directing ESDC to cooperate with—indeed, "encourag[e] maximum participation by"—private entities. N.Y. UNCONSOL. LAWS § 6252 (McKinney Supp. 2008). Not a single paragraph in the entire complaint alleged any *fact* demonstrating that the public Respondents had or could have had any reason to abdicate their professional and public responsibilities in order to collude for the sole purpose of enriching the private developer.

Petitioners immediately sought permission to seek expedited, far-flung discovery of written communications and deposition testimony to reveal the subjective "motives" of public officials in supporting or facilitating the Project. That motion for expedited discovery was stayed in relevant part.

Respondents thereafter moved to dismiss the complaint for failure to state a claim, as well as on grounds of ripeness and abstention. The district court referred the motion initially to a magistrate judge.

4. The Decisions Below

Magistrate Judge Levy issued a Report and Recommendation recommending dismissal (App. 116a-168a) on grounds that abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), was warranted in light of the State's comprehensive statutory scheme for judicial review of public use determinations. Accordingly, he did not reach the question whether plaintiffs had stated a federal constitutional claim upon which relief could be granted.

The district court dismissed with prejudice the federal claims in their entirety. (App. 31a-115a.) Although it rejected Judge Levy's recommendation that abstention was warranted, it concluded that plaintiffs had failed to state a claim for relief under the Public Use Clause.

After analyzing the three controlling Supreme Court cases—*Berman v. Parker*, 348 U.S. 26 (1954), *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Kelo v. City of New London*, 545 U.S. 469 (2005)—the district court articulated its view of the pertinent inquiry under that Clause: "[A] taking fails the public use requirement if and only if the uses offered to justify it are 'palpably without reasonable foundation,' such as if (1) the 'sole purpose' of

the taking is to transfer property to a private party, or (2) the asserted purpose of the taking is a 'mere pretext' for an actual purpose to bestow a private benefit." (App. 103a (citations omitted).) Under neither test, the district court held, could Petitioners' challenge survive dismissal.

The district court concluded that Petitioners' bare accusation that "[t]he public does not benefit from the taking of Plaintiffs' properties" was unsupported by their own allegations, which challenged only the extent—but not the existence—of the Project's numerous public purposes. (App. 104a.) Because Petitioners plainly had not alleged that the Project would serve no public purpose, the district court found that their claim necessarily failed under the well-worn principles established by *Berman* and *Midkiff*. The court, however, construed *Kelo* as permitting Petitioners to state a claim if they could allege facts that the asserted public purposes for the Project were "mere pretexts" for an "actual purpose" to "bestow a private benefit." (App. 107a (quoting *Kelo*, 545 U.S. at 478).) Applying that test, the district court concluded that Petitioners' allegations again fell short of the mark. Petitioners had failed to "allege any facts suggesting that any Defendant had any reason to bestow a benefit on any private party. Therefore, even if plaintiffs could prove every allegation in the Amended Complaint, a reasonable juror would not be able to conclude that the public purposes offered in support of the Project [were] 'mere pretexts' within the meaning of *Kelo*." (App. 109a.)

The court of appeals affirmed. Recognizing that "the primary mechanism for enforcing the public-use requirement has been the accountability of political officials to the electorate, not the scrutiny of the federal courts" (App. 13a), the court rejected the "argument that the ESDC is undeserving of such deference because it is merely a state agency deputized by the legislature." (App. 20a.) The court noted that this Court "has expressly extended deference in

such matters to both 'Congress and its authorized agencies.'" (*Id.* (quoting *Berman*, 348 U.S. at 33).) It further took judicial notice of the fact that the PACB (a body that included designees of the Speaker of the State Assembly, the Majority Leader of the State Senate, and then-Governor Pataki) had approved the State's financial contribution to the Project. (App. 20a n.7.)

The court of appeals held that the complaint's allegations foreclosed "any blanket suggestion that the Project can be expected to result in no benefits to the public." (App. 16a.) For example, "the complaint does not allege, nor could it, that either the Renewal Area or the Takings Area are devoid of blight." (App. 17a.) In fact, the court found that the Petitioners had "effectively acknowledged the Project's rational relationship to numerous well-established public uses" (App. 24a)—"among them the redress of blight, the creation of affordable housing, the creation of public open space, and various mass-transit improvements." (App. 17a.)

Finally, the court of appeals disagreed with Petitioners that these public purposes "should nonetheless be rejected as 'pretextual,' not because they are false, but because they are not the [illegible]al reason for the Project's approval." (App. 17a.) The court concluded that the kind of pretext claim advanced by Petitioners was of "especially dubious jurisprudential pedigree" (App. 24a) because it would require, contrary to this Court's holdings in *Berman* and *Midkiff*, analysis of the "purity of the motives" of government officials (App. 25a) through "full judicial inquiry into the subjective motivation of every official who supported the Project, an exercise . . . fraught with conceptual and practical difficulties" (App. 26a.)

While "preserving the possibility that a fact pattern may one day arise" where "a closer *objective* scrutiny of the justification being offered is required" (App. 27a (emphasis

in original)), the court rejected that this is such a case. In this case, "[a]lthough the claim is far-reaching, the specific allegations underlying it are less so." (App. 10a.) Petitioners "have failed to allege any specific examples of illegality in the elaborate process by which the Project was approved, any specific illustration of improper dealings between Mr. Ratner and the pertinent government officials, or any specific defect in the Project that would be so egregious." (App. 30a.)

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT AMONG THE LOWER COURTS WARRANTING THIS COURT'S ATTENTION

A. The Second Circuit's "Pretext" Analysis is Consistent with the Very Few Lower Court Decisions that Have Addressed Pretext Claims in Public Use Clause Cases.

Attempting to create a conflict among the courts where none exists, Petitioners cite only three other cases since *Kelo* in which pretext claims arguably have been litigated: an unpublished decision from the Northern District of California, *MHC Financial Ltd. Partnership v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), a New York State intermediate appellate court decision, *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), and a decision of the District of Columbia Court of Appeals, *Franco v. National Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007).

That sparse and undeveloped case law in itself strongly militates against this Court's review. Moreover, the decision below does not conflict with those cases, and is fully in accord with the few other decisions that have addressed pretext claims in the aftermath of *Kelo*.

In *Franco*, the District of Columbia Court of Appeals reversed the trial court's striking of a Public Use Clause defense to a condemnation, but did so under very different circumstances. There, the draft bill authorizing the condemnation "did not explain why the properties were 'necessary' or to what 'public use' they would be devoted." *Franco*, 930 A.2d at 163. Nine months later, after public hearings, the District of Columbia Council passed the bill approving the condemnation, but the passed version included a set of findings that were not in the version that had been reported on by the committee. These inserted findings, which no further public hearings had been held to address, asserted in conclusory fashion that the properties were part of a complex that was "'a blighting factor'" in the nearby communities. *Id.* There was no cited study that supported this legislative "finding," and no opportunity for the public to contest the finding.

Mr. Franco, the owner of the condemned property, sought to block the condemnation by asserting that the asserted public purpose was pretextual. Concluding that Mr. Franco had properly pled a pretext defense on the merits, the Court of Appeals stated that while "the permanent legislation recites that NCRC [the condemning agency] had 'advised the Council that the Skyland Shopping Center is blighted,' . . according to Mr. Franco, NCRC admitted that it had made no such finding." *Id.* at 171.

In fact, *Franco* is in accord with the decision below. The court in *Franco*, like the Second Circuit below, stated that in those rare cases where a pretext claim or defense might be pled, litigation of such a claim is limited to review of the objective record underlying a public use determination. *Franco* admonished that the word "pretextual" in *Kelo* "is used to characterize the public benefits that will flow from the taking, not the thought processes of legislators or other governmental officials." *Franco*, 930 A.2d at 173 (citing

Kelo, 545 U.S. at 490 (Kennedy, J., concurring)). Thus, "if the record discloses . . . that the taking will serve 'an overriding public purpose' and that the proposed development 'will provide substantial benefits to the public,' the courts must defer to the judgment of the legislature." *Franco*, 930 A.2d at 174. Reviewing *Kelo*, *Franco* also expressly rejected the constitutional significance of Mr. Franco's allegations that the taking failed the public use requirement because "the identities of the benefiting private parties were known before the taking was authorized by the legislature and that there is no comprehensive plan for redeveloping the area." *Franco*, 930 A.2d at 175.

The two additional cases cited by Petitioners are inapposite and not in conflict with the decision below. In *MHC Financing Ltd. Partnership v. City of San Rafael*, No. C 00-3785 VRW, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), a rent control ordinance applicable to mobile home parks was challenged as violative of the Public Use Clause. Citing *Kelo*, the district court denied the city's motion for summary judgment on plaintiff's private takings claim, *see MHC Financing*, 2006 WL 3507937, at *14, because there was no evidence that the ordinance was part of a "'carefully considered development plan,'" or that the ordinance did more than confer "a private benefit on the incumbent tenants." *Id.* In making the latter determination, the court stated that a court should "'*review the record*'" to see if a "'plausible accusation of impermissible favoritism to private parties'" has merit. *Id.* (emphasis added) (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)). But the case had nothing to do with the transfer of real estate or other tangible property from one owner to another, and thus the court's discussion of *Kelo* was purely a matter of analogy.

Similarly, in *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127 (N.Y. App. Div. 2007), an on-the-face review of the allegations concerning public use and the underlying

record exposed the pretextual nature of the asserted public purposes. The owner of the property proposed to devote it to substantially the same uses (including affordable housing) as the village proposed, and the village's determination and findings in support of condemnation "fail[ed] to articulate how or in what manner the condemnation . . . fosters any benefit to the public which would not be obtained absent the condemnation." *Id.* at 139; *see generally id.* at 139-42.

Here, by contrast, the Petitioners' allegations on their face concede multiple undisputed public purposes served by the Project. It is only the subjective motivation of officials that Petitioners seek to challenge as impure and pretextual. Other lower courts have refused to recognize a pretext claim in the face of much less support for valid public purposes than presented here. *See, e.g.*, *Western Seafood Co. v. United States*, 202 Fed. Appx. 670, 675 (5th Cir. 2006) (rejecting pretext argument although the beneficiaries of the transfer of property were "identified prior to or at the earliest stages of the City's planning process"); *CBS Outdoor Inc. v. New Jersey Transit Corp.*, Civil Action No. 06-2428 (HAA), 2007 WL 2509633, at *14-15 (D.N.J. Aug. 30, 2007) (rejecting "bald legal allegations" that the purported purposes of a project were dubious, or that there was favoritism or bias, as insufficient to state a pretext claim).

B. There is No Legal Conflict or Confusion that Agencies Such as ESDC with Legislatively Delegated Eminent Domain Powers are Entitled to the Same Deference as Legislatures in Their Public Use Determinations.

The court of appeals correctly rejected the argument that ESDC's determination to condemn is undeserving of deference merely because ESDC is a state agency with legislatively delegated eminent domain powers (rather than

the legislature itself). There is no lower court conflict on this point.

This Court has expressly extended deference to both "Congress *and its authorized agencies*." *Berman*, 348 U.S. at 33 (emphasis added) (upholding condemnation by the District of Columbia Redevelopment Land Agency, a public benefit corporation created by Congress and granted the power of eminent domain for "the redevelopment of blighted territory"). *Id.* at 29; *see also Schneider v. District of Columbia*, 117 F. Supp. 705, 710-11 (D.D.C. 1953) (summarizing the District of Columbia Redevelopment Act), *aff'd as modified on other grounds, sub nom. Berman v. Parker*, 348 U.S. 26 (1954).

The cases cited by Petitioners do not evidence a lower court conflict regarding the degree of deference to be afforded to a condemning agency as opposed to a legislature. In *Daniels v. Area Plan Commission*, 306 F.3d 445 (7th Cir. 2002), the reason the court did not extend deference to the condemnor's determination was not because of its status as a local planning commission with delegated eminent domain powers, but because the commission had premised its public use determination on a ground (economic development) that fell outside the Indiana legislature's delegation of authority to it. *See id.* at 462-63.

In fact, consistent with the decision below, the *Daniels* court acknowledged that a local agency acting *within* its delegated powers of eminent domain should be afforded the same deference due to a legislature: "[T]o the extent that the decisions of the . . . Commission fall under specific Indiana legislative determinations of public use, they should not be disturbed unless the decision is 'palpably without reasonable foundation.'" *Id.* at 460 (quoting *Midkiff*, 467 U.S. at 241).

Similarly, in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc), the Ninth Circuit addressed not the

deference owed to a public agency's condemnation determination pursuant to its legislatively delegated authority, but "an *uncompensated* taking through a raw misuse of government power." *Id.* at 1321 (emphasis added). At issue there was an alleged "scheme by [city officials] to evict tenants, deprive the plaintiffs of rental income . . . , prevent owners from learning what repairs were necessary to come into compliance, and invent new violations." *Id.* "The alleged purpose of this scheme was to deprive the plaintiffs of their property, either by forced sale, driving down the market value of the properties so a shopping-center developer could buy them at a lower price, or by causing the plaintiffs to lose their properties by foreclosure." *Id.* The court not surprisingly stated as dictum that "the usual extreme deference that courts owe to legislative determinations of public use" was not appropriate to such *de facto* confiscatory enforcement activity by individual city officials acting without legislative delegation of eminent domain powers. *Id.*; *see also id.* at 1313-15 (detailing alleged scheme).

The limited holdings of *Daniels* and *Armendariz* are fully consistent with the decision below. There is no claim that ESDC acted outside, or in excess of, the power granted to it by the legislature under the UDC Act. In fact, ESDC's authority to proceed with the Project under state law (including the UDC Act and SEQRA) was specifically upheld in a comprehensive and lengthy decision by the New York State Supreme Court, New York County. *See Develop Don't Destroy (Brooklyn) v. Urban Dev. Corp.*, No. 104597/2007, 2008 N.Y. Misc. LEXIS 551, at *1, *6-14, *30-77 (N.Y. Sup. Ct. Jan. 11, 2008); *see also id.* at *1, *7-14, *20-30 (upholding Project approvals by the Metropolitan Transportation Authority and the PACB).

II. THE DECISION BELOW IS FULLY IN ACCORD WITH THIS COURT'S LONGSTANDING PRECEDENTS

The decisions below are a straightforward application of this Court's long-standing precedents concerning the deferential level of judicial review accorded to public use determinations—precedents that were reaffirmed in 2005 and embraced by eight Justices in *Kelo v. City of New London*, 545 U.S. 469 (2005).

This Court long has construed the "public use" limitation to trigger only the most deferential judicial scrutiny. A taking serves a "public use" when "the exercise of the eminent domain power is rationally related to a conceivable public purpose." *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984). Because "[t]he role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one," *Berman v. Parker*, 348 U.S. 26, 32 (1954), a court should not "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be *palpably without reasonable foundation.*" *Midkiff*, 467 U.S. at 241 (emphasis added) (quoting *United States v. Gettysburg Elec. Ry. Co.*, 160 U.S. 668, 680 (1896)).

Applying these bedrock principles, the proposed taking of Petitioners' properties plainly passes constitutional muster.

A. The Project Serves Multiple Undisputed Public Purposes.

Petitioners do not and cannot deny that remediation of longstanding blight is a quintessential public purpose. *See, e.g., Berman*, 348 U.S. at 33-35; *Rosenthal & Rosenthal Inc. v. New York State Urban Dev. Corp.*, 771 F.2d 44, 46 (2d Cir. 1985) (removal of blight "is a classic example of a taking for a public use"). They admit, moreover, that the

majority of the Project site is in fact blighted (App. 186a-187a ¶¶ 55, 57; App. 198a ¶¶ 104-05), and the courts below recognized as much in reviewing the complaint (App. 18a, 104a-105a). *See also Develop Don't Destroy (Brooklyn)*, 2008 N.Y. Misc. LEXIS 551 at *58; ("[P]etitioners concede that the majority of the Project area is blighted, as they are not challenging the blight designation under ATURA as to 63 percent of the site, which has stood for nearly 40 years.").

And other purposes that will be served undeniably are public ones: a new sports arena—home to a major-league professional sports team in Brooklyn for the first time since the move (heartbreaking for many residents) of the Brooklyn Dodgers in 1957—will be built on the Project site; mass transit will be improved by the building of, among other things, a new railyard to service the massive public transportation hub at Atlantic Yards and a new subway entrance; new public open space will be created; and below-market-rate affordable housing will be constructed. *Cf., e.g.*, *Kelo*, 545 U.S. at 497-98 (O'Connor, J., dissenting) (identifying as clear "public uses" "a railroad" and "a stadium"); *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 422-23 (1992) (taking to facilitate intercity rail service furthered a public use); *Pennell v. City of San Jose*, 485 U.S. 1, 11-12 (1988) (efforts to relieve housing market pressures were within State's police powers); *Shoemaker v. United States*, 147 U.S. 282, 297 (1893) (noting numerous decisions holding that "land taken in a city for public parks and squares, by authority of law . . . is taken for a public use"); *Southeast Land Dev. Assocs., L.P. v. District of Columbia*, No. Civ.A. 05-1413RWR, 2005 WL 3211458, at *5 (D.D.C. Nov. 1, 2005) (taking to build baseball stadium did not violate the Public Use Clause).

Thus, as the district court concluded, plaintiffs' bare accusation that "[t]he public does not benefit from the taking of Plaintiffs' properties" was unsupported by their own

allegations. (App. 104a.) In truth, "although Plaintiffs allege that the net gain in tax revenues will be lower than defendants have predicted, they do not allege that there will be no net gain." (*Id.*) Likewise, "although Plaintiffs allege that Defendants' claims about job creation are overstated, they do not suggest that the Project will fail to create jobs." (*Id.*) And "Plaintiffs do not allege that the Project will fail to achieve a significant net increase in housing units in the area, and it is clear that it is intended to do so." (App. 105a.) Finally, "Plaintiffs also do not allege that the Project's non-quantifiable public benefits"—like the return of a major-league sports team to Brooklyn—"are false." (App. 106a.)

While Petitioners do challenge some of the asserted public purposes (creation of affordable housing and jobs) on grounds that the full targeted gains will not be realized, assertions about the *inadequate extent* rather than the *nonexistence* of certain public benefits, even if true, do not state a claim under the Public Use Clause. It has been settled for over half a century that "the legislature, not the judiciary, is the main guardian of the public needs to be served" by an exercise of eminent domain and the appropriate scope of the project. *Berman*, 348 U.S. at 32. Accordingly, even in those cases—*unlike* this one—where the *sole* justification for the taking at issue is economic development, a federal court should not "second-guess [a condemnor's] considered judgments about the efficacy of its development plan," or try to evaluate for itself whether the public purpose asserted will actually be realized. *Kelo*, 545 U.S. at 488-89. Nor should it "second-guess [a condemnor's] determinations as to what lands it needs to acquire in order to effectuate the project." *Id.*; *see also Berman*, 348 U.S. at 35-36 ("It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided, [these decisions rest] in the discretion of the legislative branch.").

B. There is No Warrant for Examining the Subjective Thoughts of Public Officials to Determine Whether Admittedly Valid Public Purposes are "Pretextual".

While the court of appeals held open the possibility that allegations in a particular case (not present here, it found) may allow for some *objective* inquiry concerning the validity of cited traditional public purposes, it properly held that the subjective thought processes of public officials should not be probed in order to determine whether admittedly valid multiple public purposes are "pretextual." Petitioners' argument to the contrary misreads *Kelo*.

Petitioners and *amicus curiae* curiously argue that *Kelo expanded* rather than *constricted* the degree of constitutional scrutiny under the Public Use Clause. They contend that a Public Use challenge can now proceed by merely alleging a principal motive or intent to benefit a private party—even if the public purposes of the project at issue are plain and admitted (and not limited to economic development). Given that *Kelo* itself reaffirmed the deferential standard of judicial scrutiny of *Berman* and *Midkiff*, the court below properly rejected that broad proposition.

Indeed, the Court granted certiorari in *Kelo* "to determine whether a city's decision to take property *for the purpose of economic development* satisfies the 'public use' requirement of the Fifth Amendment." *Kelo*, 545 U.S. at 477 (emphasis added); *see also* Petition for Writ of Certiorari at i, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), *available at* 2004 WL 1659558. Acknowledging the narrowness of the question presented, the *Kelo* Court emphasized a key factual distinction from *Berman*: "Those who govern the City [of New London] were not confronted with the need to remove blight in" the area designated for redevelopment. *Kelo*, 545 U.S. at 483. It also noted

plaintiffs' argument that "using eminent domain for economic development impermissibly blurs the boundary between public and private takings." *Id.* at 485. Nonetheless, the Court explained, under the broad deferential standards enunciated in *Berman* and *Midkiff*, the City's determinations that the takings would foster economic development and therefore served the public interest were entitled to respect, and foreclosed any challenge under the Public Use Clause. *See id.* at 480-82, 484-86.

Amicus curiae counsels against a rule of law that would limit the ability of plaintiffs to develop a factual record to support suppositions of illicit motive. But as the Second Circuit correctly observed, even if a pretext claim can survive review of the complaint and documents referenced therein on a motion to dismiss, litigation of such a claim must be limited to an *objective* factual record, because "a full judicial inquiry into the subjective motivation of every official who supported the Project [is] an exercise . . . fraught with conceptual and practical difficulties." (App. 26a; *see also id.* at 27a (quoting *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) (Scalia, J., dissenting)).) Where that objective record demonstrates that a proposed condemnation will further numerous, substantial and undisputed public purposes, even proof of impure subjective motives on the part of public officials approving the condemnation could not negate the public purposes served by the project. A contrary rule of law would allow harmful fishing expeditions into the subjective motivations of public officials.

That kind of subjective—rather than objective, on-the-record—scrutiny is precisely what has been rejected by every lower court to consider the possibility of a pretext claim in the wake of *Kelo*. *See supra* pp. ___ (discussing *Franco v. Nat'l Capital Revitalization Corp.*, *49 WB, LLC v. Vill. of Haverstraw*, and *MHC Fin. Ltd. P'ship v. City of San Rafael*; *see also Brody v. Vill. of Port Chester*, 434 F.3d 121,

136 (2d Cir. 2005) (no judicial "examination of the thought processes of those exercising the legislative prerogative" is warranted under the Public Use Clause).

C. The Lower Courts' Determination that the Complaint's Allegations of Improper Motive Cannot Survive Dismissal Does Not Merit Review by this Court.

Even if the subjective motives of public officials could be relevant to a Public Use Clause inquiry, both courts below determined that this particular complaint did not allege facts sufficient to challenge such motives. (App. 30a, 108a-109a.) As the district court found, Petitioners' conclusory allegations concerning former Governor Pataki's, Mayor Bloomberg's and other public officials' purportedly illicit desires and intents in this case did not amount to alleged *facts* or "'a *plausible* accusation of impermissible favoritism to private parties.'" (App. 108a (quoting *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring)).) The complaint did not allege, for example, any special relationship between any of the public Respondents and Bruce Ratner, or how or why the former would have had any reason to abdicate their significant professional and public responsibilities in order to benefit the latter. Accordingly, the court of appeals concluded that "[a]lthough [Petitioners' pretext] claim is far-reaching, the specific allegations underlying it are less so." (App. at 10a.)

That case-specific determination does not merit review by this Court, and thus this case is not a proper vehicle to

consider the question presented concerning the viability of a properly pled claim of pretext.[5]

III. THIS COURT'S REVIEW IS UNWARRANTED BECAUSE ISSUES CONCERNING THE BOUNDS OF EMINENT DOMAIN POWER ARE ACTIVELY PERCOLATING IN STATE LEGISLATURES AND COURTS

Insofar as Petitioners and *amicus* seek review by this Court of the appropriate bounds of eminent domain power in the wake of *Kelo*, such review is unwarranted because these issues are being vigorously debated and resolved in the political and judicial branches of state and local governments, where they are best resolved. *Kelo* itself emphasized that while the decision set forth the broadest extent of the eminent domain power, "nothing in [it] precludes any State from placing further restrictions on its exercise of [that] power." *Kelo*, 545 U.S. at 489.

Indeed, through statute, citizen initiative and constitutional amendment, or a combination of those instruments, 42 states have changed their eminent domain laws since *Kelo* was decided. *See* CASTLE COALITION, 50 STATE REPORT CARD: TRACKING EMINENT DOMAIN REFORM LEGISLATION SINCE *KELO* 1 (2007), http://www.castlecoalition.org/pdf/ publications/report_card/ 50_State_Report.pdf (last visited May 15, 2008); *see also* NATIONAL CONFERENCE OF STATE LEGISLATURES, EMINENT DOMAIN, http://www.ncsl.org/programs/natres/

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[5] *Amicus curiae* suggests that this case is a vehicle for the Court to clarify the scope of *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). But as the court of appeals made clear, its decision was not predicated upon the outer bounds of *Twombly* or determination of pleading standards. (App. 12a.)

EMINDOMAIN.htm (last visited May 15, 2008); *see also, e.g., Harrison Redevelopment Agency v. DeRose*, 942 A.2d 59, 89 (N.J. Super. Ct. App. Div. 2008) ("Since *Kelo* was decided, greater judicial and legislative scrutiny of redevelopment-based takings has occurred" in various States.).

Of the eight States that have not responded to *Kelo* with enacted legislation, referenda, or amendments, three have seen changes to their eminent domain laws through court decisions. *See, e.g., Bd. of County Comm'rs v. Lowery*, 136 P.3d 639, 647-52 (Okla. 2006); *see also Gallenthin Realty Dev., Inc. v. Borough of Paulsboro*, 924 A.2d 447, 460 (N.J. 2007) (interpreting the State's statutory definition of blight narrowly); *R.I. Econ. Dev. Corp. v. Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006); *see generally City of Norwood v. Horney*, 853 N.E.2d 1115, 1141 (Ohio 2006) (holding that "economic development" is not a "public use" under the State's Constitution and noting that it need not follow *Kelo* in interpreting its own constitution).

Although New York State has not yet enacted legislation since *Kelo*, at least 17 bills have been introduced in the state legislature. *See 49 WB, LLC*, 839 N.Y.S.2d at 130, n.1. And New York's state courts have scrutinized the public uses served by proposed takings. *See generally, e.g., id.*

This locus for activity, initiative and diversity at the state level is as it should be. As *Kelo* recognized, this Court's "earliest [public use] cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs." 545 U.S. at 482 (citation omitted); *see also Rindge Co. v. L.A. County*, 262 U.S. 700, 705-706 (1923) (what constitutes public use "is influenced by local conditions; and this Court . . . [should] regard with great

respect the judgments of state courts upon what should be deemed public uses in any state.").

The variety of changes across the country reflects the robust nature of the debate. Intervention by the Court at this time would risk curtailing the vibrant discussion of policy choices occurring at the state level.

IV. THIS CASE IS NOT A GOOD VEHICLE TO CONSIDER THE QUESTION PRESENTED BECAUSE OF ISSUES CONCERNING THE NEED FOR *BURFORD* ABSTENTION.

The question presented by Petitioners concerning the scope of a "pretext" claim under the Public Use Clause may not ultimately be reached in this case. Accordingly, this case is not a good vehicle for consideration of the question.

Petitioners' action was brought in federal court in derogation of a comprehensive state statutory scheme that provided for expedited judicial review of public use determinations in state court. *See* N.Y. EM. DOM. PROC. LAW § 207 (McKinney 2002). Bypassing this state review mechanism, Petitioners instead filed this action in federal court. Respondents argued before the district court that the court should abstain from deciding the matter. Magistrate Judge Levy accepted that argument, although the district court ultimately dismissed the complaint on the merits rather than on abstention grounds.

Magistrate Judge Levy concluded that *Burford* abstention is called for because the federal interest in retaining jurisdiction is outweighed by the State's competing concern to have particular kinds of cases adjudicated in a state forum. (App. 157a-158a.) Here, Judge Levy reasoned, "New York's EDPL sets forth a highly specific and comprehensive mechanism for condemnees to challenge any aspect of a condemnation in a state-created system of administrative and

judicial review" (App. 159a), and "it is indisputable that eminent domain is traditionally a matter of local concern and that the state has a vital interest in establishing a coherent policy with respect to it" (App. 160a). Finally, Judge Levy observed, "allowing plaintiffs to do an end-run around the EDPL and instead litigate their claims in federal court would provide incentive for forum shopping and thereby undermine New York's legislative scheme governing the exercise of eminent domain power." (App. 163a.)

Petitioners' invocation of the Public Use Clause as a basis for asking the federal courts to review a public use determination before state procedures have run their course is extraordinary. The Supreme Court and lower federal courts consistently have held that the exercise of eminent domain, as well as public use determinations in support thereof, are matters of quintessentially local concern. *See, e.g., La. Power & Light Co. v City of Thibodaux*, 360 U.S. 25, 28-29 (1959). Challenges to such determinations—even federal constitutional challenges—therefore ordinarily belong in state court, subject to ultimate review in this Court. Federal district court scrutiny in the first instance is severely limited and, when exercised, highly deferential. Indeed, in the thirty years since the EDPL was enacted in 1977 and until this case, federal district courts sitting in New York have, in decisions published in the Federal Supplement or available through online sources, considered just *five* suits challenging a condemnor's proposed exercise of eminent domain pursuant to New York law under the Public Use Clause of the Fifth Amendment. Of those five cases, not one proceeded to trial. One was dismissed for lack of ripeness (*Port Chester Yacht Club, Inc. v. Iasillo*, 614 F. Supp. 318, 323 (S.D.N.Y. 1985)); two were disposed of on, *inter alia*, abstention grounds (*Didden v. Village of Port Chester*, 322 F. Supp. 2d 385, 388 (S.D.N.Y. 2004) *aff'd*, 173 Fed. Appx. 931 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1127 (2007); *Broadway 41st Street Realty Corp. v. New York State Urban*

Development Corp., 733 F. Supp. 735, 744 (S.D.N.Y. 1990)); one was dismissed on the basis of *res judicata* (*Waldo's, Inc. v. Village of Johnson City*, No. 89-CV-897, 1989 WL 153727, at *5 (N.D.N.Y. Dec. 15, 1989)); and one was dismissed for failure to state a claim before discovery commenced (*Rosenthal & Rosenthal, Inc. v. New York State Urban Development Corp.*, 605 F. Supp. 612, 619 (S.D.N.Y), *aff'd*, 771 F.2d 44 (2d Cir. 1985)). By contrast, during that same thirty-year period, the Appellate Division of the New York Supreme Court has, in reported decisions alone, adjudicated well over 100 proceedings brought pursuant to EDPL § 207—with many of those proceedings involving the consolidated petitions of multiple allegedly aggrieved parties.

Federal district court review of local public use determinations is the exception, not the rule. Allowing plaintiffs to pursue challenges to public use determinations in federal court in the first instance undermines the state statutory scheme. Issues concerning the need for *Burford* abstention may therefore prevent this Court from reaching the merits of Petitioners' public use claim, counseling against grant of the Petition.

CONCLUSION

The petition for writ of certiorari should be denied.

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DANIEL GOLDSTEIN, ET AL.,
Petitioners,

v.

GEORGE E. PATAKI, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONERS

As the petition demonstrated, the Second Circuit's decision to foreclose petitioners' pretext-based Public Use Clause claim – as a matter of law on a motion to dismiss – warrants this Court's review: (1) because it is directly at odds with the decisions of other courts, notably the opinion of the court of last resort for the District of Columbia reinstating a pretext-based pleading, *see Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160 (D.C. 2007); and (2) because the conflict reflects the confusion created by this Court's assurance that the Public Use Clause "no doubt" prohibits the taking of "property under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit," while at the same time adhering to the principle that near absolute deference must be paid to legislative public use determinations, *see Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

I. The Conflict And Confusion Over The Scope Of Pretext-Based Public Use Clause Claims Is Real And Important

This case presents – squarely and cleanly – an important long-standing doctrinal question that has confounded lower courts both before[1] and after *Kelo*:

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[1] For pre-*Kelo* pretext cases in the state courts, *see* Pet. 21, n.11. For pre-*Kelo* pretext cases in the federal courts, *see* Pet. 36-38; *see also* Brief of *Amicus Curiae* Institute for Justice at 6-7 (citing cases).

How should a pretext-based Public Use Clause claim be evaluated given that condemnors can *always* posit a conceivable public benefit to justify a taking?

The decisions of the Second Circuit here and the highest court for the District of Columbia in *Franco* starkly illustrate the problem.

A. This Case. Relying on *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), the Second Circuit in this case held that *no* Public Use Clause claim can survive dismissal at the pleading stage when the taking is justified on blight grounds because addressing blight is a "classic public use" justification. Pet. App. 27a-28a. By the Second Circuit's lights, it did not matter that petitioners alleged (and indeed it is beyond dispute) that vague concerns about blight were raised for the first time as a justifying public purpose nearly three years *after* the decision to seize petitioners' homes. Pet. 9-11.[2] Nor did it matter that the complaint in this action contested respondents' *post-hoc* blight finding on the merits because it defined blight as the existence of "weeds" or "underutilization." *Id.; see also id.* 19-20.

B. *Franco*. Faced with the same question as the Second Circuit below, the court of last resort for the District of Columbia held that "*Kelo* makes clear that there is room for a landowner to claim that the legislature's declaration of public purpose is a pretext designed to mask a taking for private purposes."

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[2] *See also* Pet. App. 187a-190a, 197a-198a, 207a.

Franco, 930 A.2d at 169. The court in *Franco* reinstated the property owner's pleading and reversed the trial court's conclusion that "once the legislature has declared a public purpose for a condemnation, an owner is foreclosed as a matter of law from demonstrating that the stated reason is a pretext." *Id.* at 168. The court recognized that the "government will rarely acknowledge that it is acting for a forbidden reason, so a property owner must in some circumstances be allowed to allege and demonstrate that the stated public purpose for the condemnation is pretextual." *Id.* at 169.[3]

C. Conflict. Respondents cannot seriously deny the direct conflict between this case and *Franco*, as well as other post-*Kelo* cases involving pretext-based Public Use Clause claims. Respondents try anyway. Opp. at 17. They note that the draft legislation authorizing condemnation in *Franco* did not mention blight, but that blight was inserted as a justification in a subsequent draft of the bill. *Id.* Here, respondents did not mention blight as a justification until nearly three years *after* petitioners' homes were slated for condemnation and then commissioned a bizarre, self-serving blight analysis that examined *only* the properties Ratner selected for his Project years earlier. Pet. 9-11, 19-20. Respondents do not explain why factual allegations containing strong

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[3] Defendants who are "of a mind to act contrary to law seldom note such a motive" in writing. *Dister v. Continental Group, Inc.* 859 F.2d 1108, 1112 (2d Cir. 1988). Indeed, direct evidence of an illegal purpose or intent "is difficult to find precisely because [defendants] deliberately try to hide it." *Id.*

circumstantial evidence that blight was an afterthought warranted upholding a pleading alleging pretext in *Franco*, but not here.[4]

Respondents go so far as to claim that "*Franco* is in accord with the decision below." Opp. 17. This is false. No honest reading of the two decisions can conclude otherwise. Had petitioners had the fortune to own homes and businesses in the District of Columbia, they, like Mr. Franco, would now be conducting civil discovery in advance of presenting their case to a fact finder.

Indeed, if petitioners lived in any state *but* New York, the state condemnation process would afford them an opportunity to present evidence and cross-examine witnesses.[5] Where property owners have

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[4] Insofar as the distinguishing factor identified by respondents is that blight was inserted as a justifying purpose *after* the council held public hearings, Opp. 17, it is important to note that the hearings in *Franco* were *legislative* hearings. The bill that contained the blight finding was voted on by elected representatives and signed into law by the mayor. Here, of course, no legislative body ever considered, much less approved, the forced transfer of petitioners' properties to Ratner.

[5] Under New York's Eminent Domain Procedure Law (N.Y. Em. Dom. Proc. Law or EDPL), a homeowner has a single circumscribed opportunity to challenge a taking on Public Use grounds. "The EDPL establishes a short, exclusive period [of 30 days] to challenge the public use determination." *Brody v. Village of Port Chester*, 434 F.3d 121, 132 (2d Cir. 2005). "[R]eview is limited to the record before the condemnor . . . and the reviewing

successfully challenged the taking of their property in recent years, it has been done based on an adversarial fact-finding. *See, e.g., Norwood v. Horney*, 853 N.E.2d 1115, 1126 (Ohio 2006) (citing trial court findings after "a hearing that lasted several days").[6]

D. Pretext. A pretext is an "[o]stensible reason or motive assigned or assumed as a color or cover for the real reason or motive." *Black's Law Dictionary* 1187 (6th ed. 1990). Despite the plain meaning of "pretext," respondents maintain that a pretext-based Public Use Clause claim, if it exists at all, must be limited to an "objective, on the record" inquiry of a proffered public purpose. Opp. 25-26 (citing decision below at Pet. App. 27a ("closer *objective* scrutiny of the justification being offered" may be required)). This makes no sense.

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court either confirms or rejects the condemnor's determination." *Id.* at 134. The court's on-the-record review is strictly limited to whether the taking is constitutional, is within the condemnor's jurisdiction, is procedurally proper, and will serve a public use, benefit or purpose. EDPL § 207. No discovery is permitted. No evidentiary hearing is allowed. Witnesses cannot be called or cross-examined. *Vill. Auto Body Works, Inc. v. Vill. of Westbury*, 454 N.Y.S.2d 741, 743 (App. Div. 1982).

[6] *See also Bailey v. Myers*, 76 P.3d 898, 904 (Ariz. App. 2003); *City and County of Denver v. Block 173 Associates*, 814 P.2d 824, 829 (Colo. 1991); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178, 1182-83 (Conn. 2002); *SWIDA v. National City Env.*, 768 N.E.2d 1, 9-11 (Ill. 2001); *City of Springfield v. Dreison Inv., Inc.*, 2000 WL 1015857 (Mass. Super. Feb. 25, 2000); *Mississippi Power and Light Co. v. Conerly*, 460 So.2d 107, 109-10 (Miss. 1984); *Chimney Rock Irr. Dist. v. Fawcus Springs Irr. Dist.*, 359 N.W.2d 100, 102 (Neb. 1984); *Casino Reinv. Dev. Auth. v. Banin*, 727 A.2d 102 (N.J. Super. 1998).

Respondents do not explain how a court screening for pretext could do so on an "objective" basis. Virtually all pretexts, after all, have some degree of "objective" facial legitimacy. Otherwise, they would not be pretexts. As respondents would have it, it would not matter if petitioners produced a video of former Governor Pataki making a deal with his old law school friend and top political supporter,[7] Bruce Ratner, to seize and transfer petitioners' properties in exchange for Ratner's fundraising support for Pataki's presidential campaign. The tape would be irrelevant because, as an "objective" matter, the pretext of "addressing blight" would benefit the public.

Respondents contend that every court that has considered a pretext claim in the wake of *Kelo* has rejected the proposition that the analysis is subjective. Opp. 26 (citing *Franco, MHC Fin. Ltd. P'ship v. San Rafael*, No. C 00-3785, 2006 WL 3507937 (N.D. Cal. Dec. 5, 2006), and *49 WB, LLC v. Village of Haverstraw*, 839 N.Y.S.2d 127, 130 (N.Y. App. Div. 2007). Respondents are wrong.[8]

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[7] *See "For Brooklyn, a Celebration or a Curse?"*, WASHINGTON POST, Jan. 26, 2004, at A1 ("Ratner is [a] top political contributor and law school friend of Pataki.").

[8] In *MHC*, not only did the court deny summary judgment and order a trial to determine whether affordable housing was merely a pretext to justify a private taking, 2006 WL 3507937, at *13-14, it later made a post-trial factual finding that the government's asserted public purpose was a pretext to conceal a private taking in violation of the Pubic Use Clause. *See MHC Fin. Ltd. v. San Rafael*, No. C-00-03785, 2008 WL 440282, at *25 (N.D. Cal. Jan. 29, 2008); *see also id.* at *17-25.

In *Franco*, the court held that, in evaluating the merits of the pretext claim on remand, the subjective "intent of the legislators" *is* part of the inquiry. To be sure, the court began its analysis by asserting that Justice Kennedy's use of the word "pretext" in *Kelo* did, to *some* degree, suggest something akin to an objective analysis, but went on to clarify that "[n]evertheless, *the same sentence refers to intent* ('transfers intended to confer benefits'), presumably *the intent of the legislators*." 930 A.2d at 173 (emphasis supplied). Weighing what it viewed as the tension between these two concepts of pretext, *Franco* concluded, rather vaguely, that courts "must focus *primarily* on benefits the public hopes to realize from the proposed taking." *Id.* (emphasis supplied). Thus, according to *Franco*, the existence of public benefits may be somewhat more important to the pretext inquiry than the subjective intent of the condemnors, but the word "primarily" confirms unmistakably that subjective intent *is* part of the inquiry.

Although the court in *Franco* ordered the trial court on remand to consider subjective intent, it was somewhat hesitant to do so, because of "formidable barriers to discovering the motives and intentions of individual legislators." *Id.* As the court observed, legislators enjoy both statutory and common law

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And, as explained *supra* n.5, New York's condemnation procedures prohibit anything more than review of the record created by the condemning authority (and here the record was essentially created by Ratner, the private beneficiary of the mass condemnations). Thus, it is no surprise that the court in *49 WB* did not hear testimony or make findings concerning the subjective purpose underlying the takings decision. 839 N.Y.S.2d 127.

privileges and immunities from disclosing their subjective motives and intentions in considering and/or acting on legislation. *Id.* n.12.

Here there is no such privilege or immunity and thus no reason for hesitancy. Ratner's and Pataki's decision to condemn respondents' properties was rubber-stamped by the ESDC, an unelected, quasi-governmental corporation. Indeed, the ESDC is so removed from state government that the Eleventh Amendment does not protect it from suit. *See* Pet. at 30, n.16.

Respondents' objective/subjective argument illustrates the confusion caused by *Kelo* and the need for this Court's guidance. As demonstrated in the petition, *Kelo*'s reference to "pretext," "purpose," "motive" and "intent" in describing why the taking there was justified by a public purpose is difficult to reconcile with the rational basis-like review that *Kelo* reiterated must be applied to legislative public purpose determinations.[9] The tension is undeniable. No court

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[9] Respondents belittle petitioners' and *amicus*'s position as a "curious[ ] argu[ment] that *Kelo expanded* rather than *constricted* the degree of constitutional scrutiny under the Public Use Clause." Opp. 25 (emphasis in original). This misses the point. The problem created (or exacerbated) by *Kelo* is how to harmonize the principle of near absolute deference to legislative public purpose determinations with the common sense understanding that such deference invites unprincipled decision-makers to take a citizen's home "under the mere pretext of a public purpose, when [the] actual purpose [is] to bestow a private benefit." 545 U.S. at 478. As set forth in Justice O'Connor's dissent in *Kelo*, "it is difficult to

has resolved it.[10] Petitioners have offered a solution that harmonizes and gives effect to both concepts in this Court's precedents. Pet. 31-38. Respondents ignore it.

Respondents, like the Second Circuit below and many other courts confronted with this dilemma, pretend that pretext-based Public Use Clause claims are non cognizable notwithstanding *Kelo*. Other courts, like *Franco,* choose to ignore *Midkiff* and *Berman,* thus allowing discovery and fact-finding into legislative motives. Only this Court can reconcile and harmonize the conflicting cases, providing much

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envision anyone but the stupid staffer failing" to manufacture a minimally plausible public purpose pretext. *Id.* at 502.

[10] The confusion concerning the nature and scope of pretext-based Public Use Clause claims has only deepened since this petition was filed. On April 22, 2008, a divided Pennsylvania appellate court sustained a taking over the objections of a homeowner proceeding *pro se*. *In re Condemnation of Land for the Southeast Central Business District Redevelopment Area #1*, No. 651 C.D.2007 (Pa. Commw. Ct., Apr. 22, 2008). The two dissenting judges observed that *Kelo* "emphasized that property may not be taken under the pretext of a public purpose when the actual purpose is to bestow private benefits and that a taking is less likely to be pretextual when the ultimate owner of property is not known at the time of the taking." *Id.* at *5-7. The dissenters concluded that the "entire history of the transaction here shows favoritism and taking of one person's private property for pretextual public benefit" in part because the private beneficiary of the taking was known before the takings decision was made. *Id.* "This record unequivocally supports the conclusion that the 'true' purpose of the taking was primarily to benefit" the private landlord, not the public. *Id.*

needed guidance to courts, and consistency and predictability for property owners, private developers and all others affected by the use (and abuse) of eminent domain.

II. Petitioners Do Not Concede Public Purpose

Respondents' next gambit is to claim – falsely – that petitioners concede that the Project will benefit the public. Their supposed support for this false statement comes from two sources.

First, as explained in the petition, Pet. 23-24, while the complaint acknowledges that respondents have claimed a variety of public benefit justifications to justify their conduct over the years, it does not concede that the Project actually will actually serve those pretextual purposes. Quite the opposite. The complaint expressly avers that the public will not benefit. Pet. App. 172a, 204a. Acknowledging respondents' *contention* is not the same as conceding its *truth*, or as the Second Circuit put it, "effectively" acknowledging a public benefit. Pet. App. 24a.

The district court made the same mistake, but less opaquely. The district court forthrightly dismissed petitioners' pretext-based Public Use Clause claim because the facts alleged in the complaint were "as consistent with lawful behavior as with unlawful behavior." Pet. App. 112a (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)). This tactic – construing the factual allegations in the light most favorable to *defendants-respondents* – turns Fed. R. Civ. P. 12(b)(6) on its head.

Second, and relatedly, respondents and the court of appeals liberally reference the self-serving record created by respondents to support their conclusion that petitioners "effectively" acknowledge a public benefit. This is improper. On a motion to dismiss, a court may not consider documents outside of the complaint unless they are "incorporated by reference" – and the complaint in this case plainly does not incorporate respondents' voluminous materials by reference. A court may only consider those documents "upon which the complaint *solely* relies and which [are] *integral to the complaint.*" *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007) (emphasis in original) (quotation omitted). Moreover, even if this standard were met in this case, it could never justify crediting *the truth* of the assertions made in respondents' own documents. *Id.* A court can note that the documents exist, and it can "determine *what* the documents stated," but it cannot consider the documents *"to prove the truth of their contents."* *Id.*

III. There Is No Reason To Withhold Review

Finally, respondents urge that this case is not a good vehicle for considering the viability and scope of pretext-based Public Use Clause claims because they may argue – as they did unsuccessfully before the district court and the court of appeals – that abstention is warranted under the doctrine announced in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). Respondents are mistaken.

In an exhaustive opinion, Pet. App. 43a-85a, the district judge rejected respondents' *Burford* argument. And, while the magistrate judge initially recommended

dismissal on *Burford* grounds (157a-167a), that recommendation was clear error as recognized by the district judge (70a n.8). Respondents' *Burford* argument was also presented to, and rejected by, the court of appeals. Abstention is simply not warranted in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In The
Supreme Court of the United States

DANIEL GOLDSTEIN, et al.,

Petitioners,

v.

GEORGE E. PATAKI, et a

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE INSTITUTE FOR JUSTICE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF AMICUS[1]

The Institute for Justice ("IJ") was founded in 1991 and is our nation's only libertarian public interest law firm. IJ is committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. IJ seeks a rule of law under which individuals can control their destinies as free and responsible members of society. IJ works to advance its mission through both the courts and the mainstream media, forging greater public appreciation for economic liberty, private property rights, school choice, free speech, and individual initiative and responsibility versus government mandate. This case centers around the abuse of eminent domain to transfer property from one private owner to another, a practice representing one of the gravest threats to private property rights in our nation today.

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[1] All counsel of record received notice of amicus's intention to file this brief at least ten days before this brief was due. Consistent with Rule 37.6, this brief has not been authored in whole or in part by counsel for a party. No person, other than Amicus, has made a monetary contribution to the preparation or submission of this brief. All parties have consented to amicus's filing of this brief.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented in the petition. Throughout the discussion, as required by the rules of civil procedure, it shall assume that all of Petitioners' allegations are true. *See* Fed. R. Civ. P. 12(b)(6).

SUMMARY OF ARGUMENT

In affirming the dismissal of Petitioners' complaint, the Second Circuit held that taking property from *A* just to transfer it to *B* is constitutional – as long as the government refuses to admit what it is doing. The Court of Appeals held, in other words, that there is no cause of action for a purely pretextual taking and thus any claim that an asserted justification is only a pretext can be dismissed under Fed. R. Civ. P. 12(b)(6). This is not simply error, but a direct result of lower-court confusion over the scope and nature of judicial review following *Kelo v. City of New London*, 545 U.S. 469 (2005).

ARGUMENT

I. LOWER COURTS ARE CONFUSED ABOUT THE EXTENT OF THE PUBLIC-USE INQUIRY AFTER *KELO*.

In *Kelo*, this Court held that the Fifth Amendment permits takings for the purpose of economic

development pursuant to a "carefully considered development plan . . . [that] was not adopted to benefit a particular class of identifiable individuals." 545 U.S. at 478 (internal quotation marks and citations omitted).

The decision below reflects confusion over the scope of this holding – specifically whether *Kelo* intended to narrow the Public Use Clause's application in circumstances where bad faith or pretext are alleged. In essence, this Petition for Certiorari presents the question of whether a plaintiff who has raised a plausible allegation of improper favoritism in the exercise of the eminent domain power is entitled to introduce evidence to prove his claim, or whether courts must credit any and all asserted justifications for a taking before any evidence can be adduced. Because nothing in *Kelo* or this Court's other precedents suggests an intent to depart from the standard practice of scrutinizing questions of public use in their particular factual context, the Court should grant *certiorari* to confirm the continued invalidity of takings made in bad faith or for pretextual reasons, and the importance of factual development in making those determinations.

A. The Constitution forbids pretextual takings.

In *Kelo*, this Court reaffirmed a fundamental tenet of its Public Use jurisprudence: a condemnor cannot take property "for the purpose of conferring a

private benefit on a particular private party. . . . [or] under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." 545 U.S. at 477-78 (citations omitted). Nothing in the Court's opinion purports to alter the longstanding rule that effecting a transfer of property from *A* to *B* is an illegitimate governmental purpose – even if presented under the pretext of a different purpose.

B. Lower courts are confused over the scope of judicial review.

The confusion in the lower courts that led to the holding below is based on the deferential standard of review developed in *Kelo*. That standard, however, was developed in reliance on three distinct characteristics of the takings at issue. First, "[t]he takings . . . would be executed pursuant to a carefully considered development plan." *Id.* at 478 (internal quotation marks and citation omitted). Second, a fully-developed factual record, reviewed by the courts below, indicated no reason to suspect any questionable purpose to the taking other than economic development. *Id.* Finally, the fact that the plan was adopted before the identity of its private beneficiaries was even known made it unquestionably clear that it was not intended to benefit a particular individual or class of individuals. *Id.* & n.6. In light of this entire context, the Court found that New London's determination that its program of economic development was necessary should be accorded substantial deference. *Id.* at 483.

Justice Kennedy's concurrence made even more plain the importance of the specific context of the takings, reinforcing the fact that the Public Use Clause forbids "transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits. . . ." *See id.* at 490 (Kennedy, J., concurring). While Justice Kennedy agreed that a presumption of invalidity should not be applied to economic-development takings *generally*, *id.* at 493, his concurrence made abundantly clear the importance of the factual findings made below to any meaningful rational basis review, particularly the finding (undisputed by any members of the Connecticut Supreme Court below) that the "plan was intended to revitalize the local economy, not to serve the interests of . . . any other private party." *Id.* at 492.

Despite the fact that this Court's opinion turned on the specific context presented and on factual findings, a number of states and localities took *Kelo* as a blank check to use eminent domain for private-to-private transfers. *See generally* Dana Berliner, *Opening the Floodgates: Eminent Domain Abuse in the Post-*Kelo *World* (2006), *available at* http://www.castlecoalition.org/pdf/publications/floodgates-report.pdf (detailing the condemnation or threatened condemnation of more than 5,000 properties in the year following *Kelo*). With the decision below, the Second Circuit has apparently signed on to this incredibly permissive view of *Kelo*, abandoning a longstanding

tradition of making public use determinations in the light of a factual record.

C. Courts have traditionally examined the question of public use in light of all the facts surrounding a taking.

The decision below, in holding that the alleged existence of blight – anywhere – grants the government *carte blanche* to condemn property without further review, reflects a rising confusion in the lower courts regarding the scope (or, rather, the existence) of the judicial role in evaluating individual citizens' claims under the Public Use Clause of the Fifth Amendment in the wake of *Kelo*.

Prior to *Kelo*, it was commonly accepted that a simple governmental assertion of public use did not end the constitutional inquiry if a property owner could establish that this assertion was pretextual or made in bad faith. *See, e.g., Shaikh v. City of Chicago*, 341 F.3d 627, 632-33 (7th Cir. 2003) (noting that constitutional "public-use protections would resolve [an owner's] concerns that the City was not motivated to take his property for [its] stated intention. . . ."); *United States v. 397.51 Acres of Land*, 692 F.2d 688, 692 (10th Cir. 1982) ("*In the absence of bad faith*, a condemnation for a public use is a matter for the legislative branch and not open to judicial determination.") (emphasis added); *United States v. 101.88 Acres of Land*, 616 F.2d 762, 767 (5th Cir. 1980) ("The court may ask in this [public use] inquiry whether the

authorized officials were acting in bad faith. . . .") (citing cases); *United States v. 58.16 Acres of Land*, 478 F.2d 1055, 1058 (7th Cir. 1973) ("The determination of whether the taking of private property is for a public use may appropriately and materially be aided by exploring the *good faith* and rationality of the governmental body in exercising its power of eminent domain.") (emphasis added); *99 Cents Only Stores v. Lancaster Redev. Agency*, 237 F. Supp. 2d 1123, 1129 (C.D. Cal. 2001), *appeal dismissed as moot*, 60 F.App'x 123 (9th Cir. 2003). This Court did not purport to overturn this long-established practice in *Kelo*. *See* 545 U.S. at 478 ("Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.").

Despite *Kelo*'s effective silence on the continued propriety of developing a factual record, however, lower courts have been thrown into confusion over the continued scope of their public use inquiry. Some courts continue to conduct a factual inquiry to determine whether an asserted public purpose is merely offered as cover for an attempt to confer a benefit on a private party. *See, e.g., MHC Fin. Ltd. P'ship v. San Rafael*, No. 00-cv-3785, 2006 WL 3507937, at *14, 2006 U.S. Dist. LEXIS 89195, at *42-*43 (N.D. Cal. Dec. 5, 2006) (denying city's motion for summary judgment in order to conduct inquiry into whether asserted purpose was pretextual); *Franco v. Nat'l Capital Revitalization Corp.*, 930 A.2d 160, 174-75

(D.C. 2007) (holding that a property owner's affirmative defense of pretext could not be resolved on the pleadings). These courts, in essence, follow the traditional principle that – however deferential review may be – "what is a public use frequently and largely depends on the facts and circumstances surrounding the particular subject-matter" at issue. *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 159-60 (1896).

D. The holding below conflicts with this longstanding tradition.

The allegations in this case are simple. The property owners alleged that taking their land would violate the Constitution because the government's asserted purpose is a mere pretext designed to conceal an illegitimate transfer from *A* to benefit *B*. In its motion to dismiss, the government said these allegations were false. The Second Circuit found for the government. In so doing, the panel below transformed the deference required by *Kelo* into a ruling that the government's asserted purpose is sacrosanct – and that a pretextual taking can only be found where the government itself admits to the pretext.

In essence, the Second Circuit ruled that Petitioners were limited to a *facial* challenge to the taking – that if the government can plausibly assert a "public use" for the taking, the judicial inquiry must end there. *See Goldstein v. Pataki*, 516 F.3d 50, 62 (2d Cir. 2008). This turns on its head the ordinary standard

of review on a 12(b)(6) motion: rather than drawing every reasonable inference in favor of a plaintiff, the court will draw every reasonable inference in favor of a defendant – applying a presumption the plaintiff is given no chance to factually rebut.[2] If the holding below is allowed to stand, federal courts in the Second Circuit will essentially be taken out of the business of hearing claims under the Public Use Clause; aggrieved citizens will have no chance to even present evidence of the government's bad faith in taking their homes.[3]

This confusion in the lower courts marks a significant departure from this Court's public-use jurisprudence. Indeed, public-use challenges considered by this Court in the past have uniformly been decided on a factual record that allowed the Court to evaluate the facts and circumstances surrounding the taking. *See Kelo,* 545 U.S. at 475-76; *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 234-35 (1984); *Berman v. Parker*, 348 U.S. 26, 30-31 (1954);[4] *Brown v. United*

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[2] The panel below is not alone in applying this backwards standard. *See, e.g., Didden v. Vill. of Port Chester*, 173 F.App'x 931, 933 (2d Cir. 2006) (unpub.) (determining on a motion to dismiss that an alleged extortionate demand was merely a "voluntary attempt to resolve [the plaintiffs'] demands").

[3] It is worth noting that the Second Circuit encompasses both New York and Connecticut, two of the country's worst offenders when it comes to the use of eminent domain for private-to-private transfers. *See* Berliner, *supra*, at 21-22, 80-85.

[4] While the lower court in *Berman* purportedly decided the case on a motion to dismiss, both parties had moved for summary judgment, and the court expressly considered the exhibits

(Continued on following page)

States, 263 U.S. 78, 80 (1923); *Hairston v. Danville and Western R.R. Co.*, 208 U.S. 598, 605 (1908); *Clark v. Nash*, 198 U.S. 361, 367-68 (1905). In other words, the Second Circuit has adopted a rule that not only departs from this Court's public-use jurisprudence, but renders impossible the sort of review conducted in every case this Court has decided under the Public Use Clause.

Simply put, the question presented in the petition is whether the presence of some degree of public purpose serves to end the judicial inquiry in a Public Use claim or whether citizens are entitled to present evidence that the purported public purpose is merely a veneer cast over a broader scheme to convey a windfall on a private individual.

The fact that a facially-valid public purpose has been articulated has not prevented other courts from examining that reason's legitimacy.[5] For example, in *R.I. Econ. Dev. Corp. v. The Parking Co., L.P.*, 892 A.2d 87 (R.I. 2006), the Rhode Island Development Corporation[6] (RIDC) sought to condemn (on behalf of

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and affidavits of both parties. *See Schneider v. Dist. of Columbia*, 117 F. Supp. 705, 708-09 (D.D.C. 1953).

[5] Indeed, a "pretext[ual]" reason is a "false or weak reason," not necessarily a wholly imaginary reason. *Black's Law Dictionary* 1206 (7th ed. 1999).

[6] Similar to Respondent Empire State Development Corporation, the Rhode Island Development Corporation is a quasigovernmental entity tasked with encouraging economic development in the state. *Compare* N.Y. Unconsol. L. Ch. 252, § 4 *with* R.I. Gen. L. § 42-64-4.

its subsidiary) a temporary easement in an airport parking garage with the expressed (and uncontested) intention of converting its use from valet parking to daily public parking. 892 A.2d at 93. Recognizing, however, that the transition from valet to public parking would not create *additional* parking spaces, the Supreme Court of Rhode Island found that this was a "pretextual and inappropriate device" designed to circumvent the terms of a lease agreement between the RIDC's subsidiary and the condemnee. *Id.* at 105-07. *Cf. Middleton Township v. Lands of Stone*, 939 A.2d 331, 338-40 (Pa. Dec. 28, 2007) (finding that town's asserted purpose of condemning land for government-owned recreational space was "post-hoc or pretextual" because the town had no plan for any actual recreational uses and had failed to even mention recreation at the time it invoked the power of eminent domain); *Matter of 49 WB, LLC, v. Village of Haverstraw*, 44 A.D.3d 226, 241-43 (N.Y. App. June 19, 2007) (rejecting proffered public purpose of "the construction of affordable housing" after finding proposed project would actually result, on net, in less available affordable housing).

In essence, the Second Circuit, by rejecting the approach of the District of Columbia in *Franco* and the traditional approach of this Court, has replaced the presumption that a government's actions are legitimate with a conclusive presumption of legitimacy that takes hold *before* facts or evidence may be introduced. Rather than deference, the Second Circuit

has adopted a rule of abdication, confusing the standard of review with the existence of review at all. *Cf. Kelo*, 545 U.S. at 492 (Kennedy, J., concurring).

II. THIS CASE FURTHER PRESENTS AN OPPORTUNITY TO CLARIFY THAT *TWOMBLY* DID NOT EFFECT A SWEEPING CHANGE IN THE LAW.

Granting *certiorari* in this case would further provide the Court with an opportunity to clarify its holding last term in *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955 (2007). In *Twombly*, the Court held that, to state a claim under section 1 of the Sherman Act, a complaint must allege facts that suggest an agreement was made among competitors. *Id.* at 1965.

A number of courts have already expressed uncertainty over the scope of this Court's holding in *Twombly*. *See, e.g., Anderson v. Sara Lee Corp.*, 508 F.3d 181, 188 (4th Cir. Nov. 19, 2007) ("In the wake of *Twombly*, courts and commentators have been grappling with the decision's meaning and reach.") (citing *Igbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007)); *Commer. Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 337 n.4 (6th Cir. Nov. 14, 2007) ("We have noted some uncertainty concerning the scope of *Twombly*."). Far from representing a radical change in the law, however, *Twombly* leaves the fundamental rules of pleading unchanged. *See, e.g., Twombly*, 127 S. Ct. at 1964-65 (summarizing general standards). Rather, *Twombly* merely stands for the proposition

that when assessing plausible inferences to be drawn from a complaint, a court need not make extravagant logical leaps. *See id.* at 1971 (finding no reason to infer conspiracy where complaint alleged only "parallel decisions to resist competition" that one could expect to find in "almost any group of competing businesses").

This case represents a simple opportunity to clarify the basic, unchanged rules of pleadings because of the numerous and specific allegations in Petitioners' complaint that lead directly to a natural inference that the overwhelming purpose of the proposed project is to bestow a financial windfall upon respondent Bruce Ratner:

- ***Timing***: Petitioners allege that Ratner developed his plan to redevelop much of central Brooklyn *prior to* the government's taking any action, and that Ratner's plan was then adopted by the government. Pet. for Cert. at 5-6. This permits an inference that the driving force behind the project was Ratner, rather than any public entity.

- ***Political Support***: Petitioners allege that Ratner was a friend and significant political contributor of then-New York Governor George Pataki. Pet. for Cert. at 7. This explains why it might be plausible that government entities would use their power to gain profits for Ratner.

- ***Actual Political Favoritism***: Petitioners allege that the Metropolitan Transit Authority bypassed its ordinary procedures to convey its property to Ratner.[7] Pet. for Cert. at 8-9.

- ***Pretextual Justifications***: Petitioners allege, in great detail, that the public uses that would purportedly be advanced by the project are incapable of withstanding even the slightest scrutiny – and, indeed, were not even mentioned until years after the government had adopted and begun advancing the project. Pet. for Cert. at 9-13. Even under a deferential standard of review, Petitioners are entitled to at least attempt to introduce evidence to clearly establish the bankruptcy of the purported public uses. *Cf. Twombly*, 127 S. Ct. at 1965.

- ***Enormous Private Benefit***: Finally, Petitioners allege that Ratner stands to profit enormously from the completion of the project, wholly swamping the (at

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[7] The panel below seemed to diminish this allegation by noting that the MTA was "not a defendant in this case." 516 F.3d at 56. Petitioners, however, do not appear to seek any remedy with respect to the MTA; rather, they appear to rely on this allegation to make even more reasonable the inference that Ratner was, in fact, able to persuade government agents to exercise their power in order to increase his profits without regard for the public interest. Further, Petitioners alleged that the MTA was at all relevant times controlled by Pataki, meaning its conduct should be imputed to Pataki. *See* Pet. for Cert. at 6.

best) *de minimis* public benefits. Pet. for Cert. at 13.

Given the difference between the logical inferences required in this case (namely, that government officials have advanced a project that does little to benefit the public in order to help out a friend and political ally) and the logical leaps demanded by the complaint at issue in *Twombly* (namely, that entities that were individually acting exactly as one would expect them to act, given their economic incentives, should be presumed to have *conspired* to act that way), this petition represents a straightforward opportunity to clarify the true, narrow scope of this Court's holding in *Twombly* – assuming, of course, that the Court resolves the split among the lower courts by reaffirming the historical importance of factual development to resolving disputes under the Public Use Clause.

CONCLUSION

While this Court undeniably held in *Kelo* that economic development could fall within the meaning of "public use," it did not change the *process* by which courts determine whether a use is "public" – nor did it change the fundamental importance of facts to that inquiry. The decision below reflects a fundamental confusion over the degree to which courts are required to credit the superficial appearance of a taking

and the post-hoc justifications of a would-be condemnor. This question does not center around how deferential a court's scrutiny should be – rather, it centers around whether a court may engage in any scrutiny in the first place. For all of the foregoing reasons, Amicus respectfully asks this honorable Court to grant *certiorari* in order to clarify that *Kelo* did not remove the federal courts' power to hear and adjudicate – on their merits – claims of bad-faith or pretextual takings under the United States Constitution.

Respectfully submitted,

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